Petition

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IN THE

Supreme Court of the United States

OCTOBER TERM 1981

NUCLEAR ENGINEERING COMPANY, INC.,
Petitioner,

v.

TYRONE C. FAHNER, individually and as Attorney General of the State of Illinois,
Respondent,

and

PEOPLE OF THE STATE OF ILLINOIS, ex rel. TYRONE C. FAHNER, Attorney General,
Respondent,

v.

NUCLEAR ENGINEERING COMPANY, INC.,
Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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(a) QUESTIONS PRESENTED FOR REVIEW

1. Whether the so-called *Wycoff* dictum (344 U. S. 237, at p. 248)—that federal question jurisdiction is not available to a declaratory judgment plaintiff affirmatively asserting federal rights when those rights can also be asserted as defenses to a threatened State court prosecution—is still viable in the face of the fact that this Court has never applied this dictum and has repeatedly held since the *Wycoff* case (1952) that federal declaratory relief is available where a federal plaintiff demonstrates a genuine threat of enforcement of state law which would violate federal rights.

2. Whether, in any event, the *Wycoff* dictum is applicable to a federal court suit for injunctive relief where irreparable injury is shown.

3. Whether, in a case where a State court defendant is a non-citizen for purposes of diversity jurisdiction, the doctrine of *Ex Parte Young* (209 U. S. 123) can be availed of to establish diversity jurisdiction (here for removal purposes) against the State official who is assuming to exercise unconstitutional authority.

4. Whether the publicly-announced pledge of the Illinois Attorney General, which in fact was carried out, to bring suit within the next two or three weeks to close down petitioner's federally-licensed business, created a 'case or controversy' for federal jurisdictional purposes.

5. Whether the grant, under The Resource Conservation And Recovery Act of 1976 ("RCRA"), to petitioner of a federal license to operate the last remaining full-spectrum site in Illinois for the authorized disposal of hazardous wastes, including out-of-state wastes, has preempted the use of the state common law of nuisance to close petitioner's operation, such pre-emption by federal law conferring federal question jurisdiction on the district court.

(b) PARTIES IN COURT BELOW*

William J. Scott, individually and as Attorney General of Illinois, who was removed from office and whose successor, Tyrone C. Fahner, was substituted by order below, and Nuclear Engineering Company, Inc. were the parties in the Court of Appeals.

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* Nuclear Engineering Company, Inc. (whose name has been changed to U. S. Ecology, Inc.) is a wholly-owned subsidiary of Teledyne, Inc., a Delaware corporation which has numerous subsidiaries, all wholly-owned, including Teledyne Industries, Inc., which was dismissed here as a party defendant in the removed state court suit. Nuclear Engineering Company, Inc. has three subsidiaries: National Environmental Engineering Co., Inc., Nuclear Engineering International Sales Corp., and Texas Ecologists, Inc.

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NUCLEAR ENGINEERING COMPANY, INC.,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

May it please the Court:

The petitioner, Nuclear Engineering Company, Inc., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered August 26, 1981.

(c) OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in Appendix 1 hereto. No opinion was rendered by the United States District Court for the Central District of Illinois, whose decision was reversed upon an interlocutory appeal permitted pursuant to 28 U. S. C. § 1292(b), after certification by the District Court that there were controlling questions of law as to which there is substantial ground for difference of opinion involving both federal question and diversity jurisdiction.

(d) JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on August 26, 1981. A timely petition for rehearing en banc was denied on October 9, 1981, and on October 19, 1981, a motion for stay of mandate, pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, was granted and the mandate below was stayed to permit petitioner to file this petition for certiorari on or before November 18, 1981, which was done. (Appendices 2 and 3 hereto.)

This Court's jurisdiction is invoked under 28 U. S. C. § 1254(1).

(e) CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

(See Appendix 4)

U. S. Constitution, XIVth Amendment, Section 1. U. S. Constitution, Art. III, Sec. 2, cl. 1.

28 U. S. C. Secs. 1331(a), 1332(a), 1337(a), 1343(a)(3), 1441, 2201.

The Resource Conservation And Recovery Act of 1976 ("RCRA"), 42 U. S. C. Sec. 6901 *et seq.;* 40 CFR 123.32(a).

(f) STATEMENT OF THE CASE

The bases for federal jurisdiction in the federal district court, to entertain petitioner's Complaint against the Illinois Attorney General for declaratory and injunctive relief and to entertain the removal of the subsequent state court suit filed by the Illinois Attorney General, were: (i) federal question jurisdiction based on the petitioner's federal rights to conduct its business pursuant to its federal license and without retroactive penalty for past licensed operations; and, (ii) diversity jurisdiction because the Illinois enforcement official was assuming to exercise unconstitutional authority against a non-citizen of Illinois. These jurisdictional questions constitute the very issues before this Court.

Behind the jurisdictional issues is a substantive issue of critical national importance which the Opinion below passes off in a single, misleading footnote (p. 13a, n. 10): can the "often vague and indeterminate nuisance concepts and maxims of equity jurisprudence" under state common law supersede petitioner's federal license to operate in compliance with all the requirements of "the comprehensive regulatory program supervised by an expert administrative agency" (the Environmental Protection Agency) and thus negate the national system of toxic waste disposal sites which it was the purpose of the comprehensive federal statute, RCRA, to set up? (*Milwaukee* v. *Illinois*, 68 L. Ed. 2d 114, 126 (1981).) The approach to this substantive background question inevitably affects the approach to the basic jurisdictional issue which this case poses, namely, petitioner's right to have federal questions of national import to the hazardous waste disposal system in this country determined initially in the federal court system, and not by eventual and unrealistic final access to this Court from the state court system.

A.

The Background

Illinois, with about 7% of the national total, is the second largest generator of toxic wastes in the nation. (*Report of The Illinois Legislative Investigating Commission to The General Assembly,* "Landfilling of Special And Hazardous Waste In Illinois" (August, 1981), pp. 7, 56.) Petitioner's ground disposal site at Sheffield, Illinois, receives a great quantity of wastes generated in Illinois, as well as a substantial amount of wastes shipped in from other states. Petitioner is the one remaining fully-licensed hazardous waste burial site in the State of Illinois.[1]

More than ninety percent of the fifty-seven million tons of hazardous chemical wastes produced annually in the United States is disposed of improperly. See, generally, S. REP. No. 848, 96th Cong., 2nd Sess. p. 3 (1980); *Report of The Illinois Legislative Investigating Commission, supra,* p. 6.

Prior to the effective date of the regulations under RCRA, there was no practical way to get a handle on the illegal dumping of toxic wastes. Although unregulated dumping is the major source of public danger, no community welcomes even a licensed hazardous waste dump site within or near its borders. (*Report of Comptroller General to Congress,* Dec. 19, 1978, "How to Dispose of Hazardous Waste—A Serious Question That Needs To Be Resolved", pp. 10-17.) An authorized ground burial site—run by an established company making substantial capital investment to maintain the site in compliance with all the regulations and requirements of the Environmental

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[1] Other refuse disposal sites, often erroneously referred to as hazardous waste disposal sites, are at times authorized by supplemental permit to take limited volumes of hazardous wastes under special conditions but are not authorized generally to accept hazardous wastes, as is petitioner.

Protection Agency—becomes a sitting target for public officials eager to gain public recognition as supposed fighters against pollution.

Highly toxic chemical wastes are a necessary by-product of industrial society, and the production of all kinds of goods which are deemed essential generates hazardous wastes. The technology of disposal by means other than ground burial is advancing, but for the foreseeable future landfills must be availed of, despite the potential environmental problems which may exist at even the most carefully planned and monitored licensed facility, such as petitioner's. (*Report of Illinois Legislative Investigating Commission, supra,* pp. 3, 90-91, 215; *Hazardous and Toxic Waste Disposal Joint Hearings Before the Subcomms. on Environmental Pollution And Resource Protection of the Senate Comm. On Environment and Public Works* (Part 4), 96th Cong., 1st Sess., p. 33.) For, the realities of litigation are that there will always be some expert witness willing to testify that the geologic or hydrogeologic conditions underlying any landfill site "may permit" material buried in the earth ultimately to leach out to ground water, and if the material is a hazardous waste which does not lose its toxicity over the years of burial, ground water pollution can always be postulated and any such disposal site branded as a prospective nuisance *per se* which should presently be abated.[2]

This Court has already recognized that the foregoing situation exists and that, despite the critical environmental problems created by virtually all sanitary landfills [there, in New Jersey], until alternative methods of disposal are devel-

[2] For example, the decision of the Illinois Appellate Court (since affirmed by the Illinois Supreme Court) shutting down what was the only other (than petitioner's) fully-licensed hazardous waste disposal site in Illinois, said: (*Village of Wilsonville* v. *SCA Services, Inc.* 77 Ill. App. 3d 618, 396 N.E. 2d 552, 565): "We consider the extremely serious nature of the possible harm foreseen by the [trial] court to override the fact that it is remote."

oped or until production of essential goods is curtailed, landfills must continue to be used. *Philadelphia* v. *New Jersey,* 437 U. S. 617, at pp. 629-630 (1978) (dissenting opinion of Rehnquist, J.).

Petitioner has always operated under license from the Illinois Environmental Protection Agency and, since the effective date of the federal regulations under RCRA, petitioner has operated under federal license from the United States Environmental Protection Agency. Petitioner has received a specific government permit for the deposit of each and every toxic substance buried at the site in question, and has, in reliance on such full governmental approval, invested over the years large sums in developing and maintaining its operation in accordance with the statutory standards as applied by the expert administrative agency.

1. The Situation At The Beginning of May, 1980.

At this point in time the then Illinois Attorney General was basking in the publicity which attended his widely-announced steps against polluters in Illinois.

(a) *The City of Milwaukee case.*

He had succeeded in getting the Seventh Circuit to declare the City of Milwaukee guilty of a federal common law nuisance in releasing sewage and storm water into Lake Michigan, although this complied with the comprehensive regulatory program under the Federal Water Pollution Control Act, and this Court had not yet granted *certiorari* (which resulted ultimately in reversal of the Seventh Circuit in *Milwaukee* v. *Illinois,* 68 L. Ed. 2d 114 (1981)).

(b) *The Wilsonville case.*

He had succeeded, in a case which was tried and appealed in the state court system prior to the effective date of RCRA and which did not involve the effect of federal law, in obtaining

the same kind of order he seeks here in respect to petitioner against the only other fully-licensed toxic waste burial site which existed in Illinois, on grounds of common law nuisance. *Village of Wilsonville* v. *SCA Services, Inc.*, 77 Ill. App. 3d 618, 396 N. E. 2d 552 (Ill. App. Ct., 1979).[3] The relief obtained by the Illinois Attorney General in the *Wilsonville* case included not only closing the disposal operation down but also imposing, contrary to all constitutional notions of fairness, the overbearingly expensive retroactive penalty of removing [to where?] all the substances buried in the past with specific permit and pursuant to the administrative guidelines interpreting the meaning and requirements of the applicable environmental protection statutes. *Cf., United States* v. *Pennsylvania Chem. Corp.*, 411 U. S. 655, 674 (1973).

(c) *The "Earth Day" Press Conference.*

He had held a press conference on April 22, 1980, at which he announced his intention to sue petitioner and said

> "I would store [toxic wastes] in a desert, in one of the remote places in the nation . . . I cannot think of any place in the State [of Illinois] with twelve million people that is a good spot to store the deadliest contaminant[s] known to mankind."

This approach of the Illinois Attorney General—that Illinois must dump its toxic wastes in other states, but no other state must dump theirs in Illinois—has drawn comment.

> "The Wilsonville controversy in addition took on the tone of protecting the state from becoming the Midwest 'dumping ground' for out-of-state waste. From the states' point of view, such an attitude is logical and defensible. From a national perspective, however, there may be only a limited number of appropriate disposal sites, which should be available to all citizens." (Andersen, "The Resource

[3] *Affirmed,* Case No. 52885, Illinois Supreme Court, May 22, 1981 (Opinion still unpublished), *rehearing denied* October 19, 1981.

Conservation and Recovery Act of 1976: Closing The Gap", 1978 *Wisconsin Law Review* 633, at p. 699.)

The Illinois Legislative Investigating Commission in its *Report, supra,* (pp. 214-5, 217-8) has recommended against desert burial sites and in favor of a regional approach by the industrial states producing the large volume of hazardous wastes.

(d) *The April 30, 1980 Newspaper Article.*

He had held a subsequent press conference later in April, 1980, at which he not only threatened to sue petitioner "at some future date", as the Seventh Circuit's Opinion puts it (p. 19a), but—in record evidence over-looked by the court below—referred to the *Wilsonville* decision, pledged prosecution of petitioner and *named the time suit would be filed.* The assistant Attorney General in charge of this kind of litigation said, in a news article, "Wilsonville Ruling May Affect Sheffield," reported in the April 30, 1980 issue of the Springfield Journal-Register, that "he expects the case [against petitioner] which the office has been developing since October, to be filed in court in *mid or late May* . . . We'd like to close the site down and have the materials removed."[4]

2. The Federal Court Suit Filed By Petitioner.

Petitioner was hardly seeking "to have the district court engage in a tautologous exercise" (Opinion below, p. 21a) when, faced with impending litigation expressly aimed at destroying its business, petitioner decided to seek the protection of a neutral federal court against the devastating outcome that had been reached in the *Wilsonville* case by a local, elected court sitting in the very vicinity of the alleged public nuisance.

[4] The policies of the former Illinois Attorney General are being continued by his appointed successor in the office.

At the beginning of May, 1980, another factor came into existence which was not present in the *Wilsonville* case and which also indicated the choice of the federal court as the appropriate forum for this litigation: On May 5, 1980, RCRA was finally implemented by the issuance of federal regulations, which were published May 19, 1980, to be effective November 19, 1980. Petitioner filed its federal court suit for declaratory and injunctive relief immediately thereafter, on May 8, 1980, in order to file before the Illinois Attorney General's announced mid-May filing date and in order to obtain the protection of a federal court for its federal operating license and other rights under RCRA and for its federal constitutional rights against the imposition of a confiscatory retroactive penalty.

The Attorney General's promised state court suit was filed on May 20, 1980, and was removed by petitioner to the federal district court where it was consolidated with petitioner's pending federal action.

B.

The Decision Of The Seventh Circuit.

The Opinion below gives no glimmer of the actual situation confronting petitioner in the first days of May, 1980. One would think, from reading the Opinion, that petitioner's counsel was just dreaming up requests for advisory legal opinions from the district court, rather than fighting desperately to save petitioner's business from imminent destruction and attempting to do so by obtaining a federal forum to decide the federal questions at stake. The decision below relegates petitioner, a non-citizen of Illinois having its principal place of business outside Illinois, to the decision of a local state court for the vindication of its federal rights. The policy of the United States Constitution is otherwise.

The Constitution itself recognizes that it is necessary—in order to allay "apprehensions and suspicions of partiality"

(*Chisholm* v. *Georgia*, 2 U.S. (2 Dall.) 419, 475 (1793)—for federal judicial power to extend to suits brought in the name of a State in its local courts against non-citizens. (U. S. Const., Art. III, Sec. 2, Cl. 1.) Although the "original *but not exclusive* jurisdiction" of such suits conferred by Congress on the United States Supreme Court (18 U. S. C. § 1251(b)(3)) has not so far been construed as implying statutory federal jurisdiction in the lower federal courts (see, *Ohio* v. *Wyandotte Chemicals Corp.*, 401 U. S. 493, 498, n. 3 (1971)), there is here, in the circumstances of the present case, a significant element of policy which militates against the niggardly approach to federal court jurisdiction which the Opinion below goes out of its way to adopt at every turn.

Finally, in its Order denying rehearing en banc the Seventh Circuit specifically mentions only "the conflict between the opinion of the panel and *Ohio ex rel. Seney* v. *Swift Co.*, 270 F. 141 (6th Cir.), *cert. denied*, 257 U. S. 633 (1921)." Despite its own rule (Circuit Rule 16(b)), that petitions for rehearing en banc shall state "with what decisions of the United States Supreme Court . . . or another court of appeals the panel decision is claimed to be in conflict," the conflicts between the Opinion below and (a) the decisions of this Court which have rejected the so-called *Wycoff* dictum, and (b) the express decision rejecting the *Wycoff* dictum by the 5th Circuit, were apparently ignored by the Seventh Circuit in considering the petition for rehearing, just as they were in the initial Opinion.

(j) REASONS FOR GRANTING THE WRIT

This case presents issues which involve both the original and removal jurisdiction of the federal district courts—an area in which the prime responsibility for decision falls upon this Court, and which concern the important and much-used aspect of that jurisdiction relating to the vindication of federal rights against impending state prosecutions.

On the issue of clear original federal question jurisdiction here being ousted by the so-called *Wycoff* dictum there is an express conflict between the decision below and the 5th Circuit (Point II below), and the use of the *Wycoff* dictum as a "viable" rule by the Seventh Circuit is in real conflict with numerous decisions of this Court which have consistently failed to apply any such rule. (Point I, below.) This is the very issue which Mr. Justice White only recently described as "an extraordinarily important jurisdictional holding [which] should be reviewed in this Court." (*United Air Lines, Inc.* v. *Division of Industrial Safety of the State of California,* No. 80-1494, 50 U. S. Law Week 3298 (Oct. 20, 1981) (Mr. Justice White dissenting from denial of *certiorari*).)

On the issue of removal jurisdiction, on grounds of diversity established by means of the 'private person' doctrine of *Ex Parte Young* (209 U. S. 123), there is an explicit conflict between the decision below and decisions of the 6th and 5th Circuits, and this is a significant aspect of federal court jurisdiction which this Court has not yet settled. (Point III, below.)

Other issues presented involve the important public question of the extent of pre-emption of state common law by RCRA (Point V, below) and the substantial departure below from the accepted course of judicial decisions in defining the 'case or controversy' requisite to federal jurisdiction (Point IV, below).

I.

THE USE OF THE *WYCOFF* DICTUM TO DEFEAT FEDERAL QUESTION JURISDICTION IN THIS SUIT FOR DECLARATORY AND INJUNCTIVE RELIEF CONFLICTS WITH THE UNIFORM RULINGS OF THIS COURT.

A. This Court Has Never Applied The *Wycoff* Dictum And Has Consistently Held That Federal Declaratory Relief Is Available Where The Federal Plaintiff Demonstrates A Genuine Threat Of Enforcement Of State Law Which Is Allegedly Violative Of Federal Rights.

Public Serv. Comm'n v. *Wycoff Co.*, 344 U. S. 237 (1952) was decided on the basis that no case or controversy was present, the plaintiff not having presented—even after trial—any evidence of past, pending or threatened action by the state officials. (344 U. S., at p. 240.) By way of acknowledged dictum the Court's opinion went on to say (344 U. S., at p. 248):

> "Where the complaint in an action for declaratory judgment seeks in essence to assert a defense to an impending or threatened state court action, it is the character of the threatened action, and not of the defense, which will determine whether there is federal-question jurisdiction in the District Court."

This statement, as a test of federal question jurisdiction in declaratory judgment actions, has never been applied or referred to with approval by this Court since the *Wycoff* case was decided in 1952. On the contrary, an unbroken line of decisions by this Court establishes that

> "federal declaratory relief is not precluded where no state prosecution is pending and a federal plaintiff demonstrates a genuine threat of enforcement of the disputed state criminal statute . . ." (*Steffel* v. *Thompson*, 415 U.S. 452, 475 (1974).)

and

> "If prosecutors and law enforcement personnel cannot be proceeded against for declaratory relief, putative plaintiffs would have to await the institution of state-court proceedings against them in order to assert their federal constitutional claims. This is not the way the law has developed ..." (*Supreme Court of Va.* v. *Consumers Union,* 446 U. S. 719, 737 (1980).)

See also, *California Comm'n* v. *United States,* 355 U. S. 534, 538-9 (1958); *Chicago* v. *Atchison, T. & S.F.R. Co.,* 357 U. S. 77 (1958); *Zwickler* v. *Koota,* 389 U. S. 241 (1967); *Lindsey* v. *Normet,* 405 U. S. 56 (1972); *Lake Carriers' Assn.* v. *Mac Mullan,* 406 U. S. 498, 508-9, n. 12 (1972); *California* v. *Larue,* 409 U. S. 109, 112-113, n. 3 (1972); *Ellis* v. *Dyson,* 421 U. S. 426, 434 (1975); *Doran* v. *Salem Inn, Inc.,* 422 U. S. 922, 930, 931 (1975); *Jones* v. *Rath Packing Co.,* 430 U. S. 519, 523-4 (1977); *Wooley* v. *Maynard,* 430 U. S. 705, 711 (1977).

In conflict with each of these decisions (which are not even alluded to in the Opinion below) the Seventh Circuit holds here, in order to oust the district court of the patent federal question jurisdiction of petitioner's Complaint asserting federal statutory (RCRA license) and constitutional rights, that "the principles embodied in the *Wycoff* dictum ... remain viable in this Circuit."[5] (Opinion, p. 22a, n. 17.)

As Mr. Justice White has recently said, in express reference to the *Wycoff* dictum:

> "Under this theory, all such litigants would be required to pursue their federal claims in state court. Perhaps they should, but that is not what the present jurisdictional statutes and our cases construing them require." *United Air*

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[5] *Skelly Oil Co.* v. *Phillips Co.,* 339 U.S. 667, 671 (1950), said to be "consistent with" the *Wycoff* dictum, merely stands for the proposition that there is no federal question jurisdiction of a federal complaint which pleads a *state* law claim and alleges that the defendant will assert an invalid federal defense to that state claim.

Lines v. *Division of Industrial Safety of the State of California,* 50 LW 3298 (No. 80-1494).[6]

B. The Application Of The *Wycoff* Dictum To A Complaint For Injunctive Relief Conflicts With Decisions Of This Court.

The *Wycoff* case itself separated the claim for injunctive relief from that of declaratory relief, the former claim having been abandoned there for lack of proof of any threatened or probable act of the defendants which might cause the irreparable injury essential to equitable relief by injunction (344 U. S., at pp. 240-241), the latter claim being decided on the basis of no case or controversy.

There can be no doubt that the Illinois Attorney General's avowed purpose to use the *Wilsonville* precedent to shut petitioner's business down and to impose a penalty of incalculable millions of dollars of expense to remove all material previously buried under governmental license and permit establishes the irreparable injury prerequisite to injunctive relief.

In calling petitioner's request for injunction "insignificant" because "premised upon the success of its claim for declaratory relief" (Opinion, p. 22a, n. 18),

> "the court erred in treating the requests for injunctive and declaratory relief as a single issue." (*Steffel* v. *Thompson,* 415 U. S. 452, 463).[7]

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[6] In Case No. 80-1494, in which *certiorari* was denied, there were long-pending state proceedings when the federal declaratory judgment suit was filed. In the case at bar there were no pending state court proceedings at the time of the federal Complaint.

[7] Indeed, the appropriateness of the request here for injunctive relief should, properly considered, make *a fortiori* the granting of any needed declaratory relief. (*Steffel* v. *Thompson,* 415 U.S. 452, 460-473 (1974).)

II.

THE USE BY THE SEVENTH CIRCUIT OF THE *WYCOFF* DICTUM AS A LIMITATION ON THE FEDERAL QUESTION JURISDICTION OF THE DISTRICT COURTS EXPRESSLY CONFLICTS WITH THE FIFTH CIRCUIT.

Upon analysis, the dictum on page 248 of the opinion in *Public Serv. Comm'n* v. *Wycoff Co.*, 344 U. S. 237 (1952), is patently unsound and, if applied, would totally eliminate federal question jurisdiction to forestall impending state court prosecutions violative of federal constitutional and statutory rights.

It is obvious that the threatened state court action by the state official will always be asserting against the federal declaratory judgment plaintiff a state law claim in the state court. *There are no state statutes which come to mind whose enforcement is based on a federal right asserted by the state prosecutor,* so that—if it is the character of the threatened state action which is the test of federal question jurisdiction, as the *Wycoff* dictum states—the test produces the absurd result that no federal question jurisdiction exists at all in this important and much-used area of federal court business.

The Fifth Circuit has refused to apply the *Wycoff* dictum and has termed it

> "... a mere truism; it is not, under the circumstances, a limitation upon the power of the district court to entertain the controversy before it." (*Braniff Intern., Inc.* v. *Florida Public Serv. Com'n.*, 576 F. 2d 1100, 1106, (C. A. 5, 1978).)

The Ninth Circuit seems to be in conflict with itself on this issue. *Cf. Conference of Federal Sav. & Loan Ass'ns* v. *Stein,* 604 F. 2d 1256, 1259 (C. A. 9, 1979), *aff'd* 445 U. S. 921 (1980) *with, United Air Lines* v. *Division of Industrial Safety, Etc.*, 633 F. 2d 814, 817 (C. A. 9, 1980), *cert den.* 50 LW 3298 (No. 80-1494).

This conflict over the viability of a dictum uttered by this Court in 1952 can only be resolved by the action of this Court.

III.

THE OPINION BELOW IS IN EXPLICIT CONFLICT WITH DECISIONS OF THE SIXTH AND FIFTH CIRCUITS OVER THE USE OF THE DOCTRINE OF *EX PARTE YOUNG* TO ESTABLISH DIVERSITY JURISDICTION FOR REMOVAL PURPOSES.

The Opinion below expressly declines to follow the decisions in *Ohio ex rel. Seney* v. *Swift Co.*, 270 Fed. 141 (C. A. 6, 1921), *app. dism'd* 260 U. S. 146 (1922) and in *Mouton* v. *Sinclair Oil and Gas Company*, 410 F. 2d 717 (C. A. 5, 1969), *cert. den.* 398 U. S. 957 (1970), which hold that the 'private person' doctrine of *Ex Parte Young* (209 U. S. 123) can be availed of, in situations such as the case at bar where the state court defendant is a non-citizen of the state where suit is brought, to establish diversity jurisdiction—especially for removal, as in the *Seney* and *Mouton* cases—against the state official who is assuming to exercise unconstitutional authority.

Although the majority of state court prosecutions will be against persons who are citizens of the state where the prosecution is brought, the jurisdictional issue here is still of substantial importance. This Court apparently deemed the decision of the Sixth Circuit in *Seney* as not lacking "substantiality" (260 U. S., at p. 149), but it has never directly passed upon this question.

IV.

THE "IMMEDIATE COERCIVE CONSEQUENCES" TEST DEVISED BY THE OPINION BELOW FOR THE EXISTENCE OF THE REQUISITE CASE OR CONTROVERSY IS A PATENTLY UNSOUND RULING HERE AND DEPARTS BASICALLY FROM THE ACCEPTED PRINCIPLES ESTABLISHED BY THIS COURT.

The Opinion below holds that, if the Illinois Attorney General had had cause to seek compliance by petitioner with some regulatory requirement which petitioner was failing to observe, there would be a case or controversy under the "immediate coercive consequences" test improvised below, because this would be "employing the threat of future enforcement to obtain current compliance." (Opinion, p. 20a) But, although the Attorney General seeks *to destroy* petitioner's business, it is held that there is *no* case or controversy, for the reason that there is no regulatory requirement which petitioner is failing to observe and with which steps can therefore be taken to comply.

The logic of the situation is, of course, exactly contrary to the Opinion below. The purpose to destroy completely the federal plaintiff's business is the ultimate in coercive action. The public pledge to do so by the Illinois Attorney General in itself justifies judicial intervention, precisely because there is nothing else the federal plaintiff can do to protect against such state enforcement action.

The test applied by the Seventh Circuit here departs so far from the accepted principles settled by this Court for determining the existence of a case or controversy, including in cases coming up from the Seventh Circuit, as to call for this Court to exercise its powers of supervision. *E.g., Atchison, Topeka & Santa Fe Ry. Co.* v. *City of Chicago,* 240 F. 2d 930, 941 (C. A.

7, 1957), *aff'd* 357 U. S. 77, 89 (1958); *Railroad Trans. Service* v. *Chicago,* 386 U. S. 351, 358 (1967) *reversing* 358 F. 2d 55, 59 (C. A. 7, 1966).

V.

THE OPINION BELOW RESTS ON THE EXPRESS, ERRONEOUS ASSUMPTION THAT FEDERAL LAW (RCRA) DOES NOT PRE-EMPT THE ILLINOIS ATTORNEY GENERAL'S ATTEMPT TO SHUT DOWN A BUSINESS WHICH IS LICENSED BY THAT FEDERAL LAW TO CONTINUE TO OPERATE.

The erroneous approach to federal law pre-emption which underlies the whole attitude of the court below in this case (Opinion, p. 13a, n. 10) is of substantial national importance in connection with the expressed Congressional objective of a uniform national system of hazardous waste management. The issue of pre-emption should be decided by this Court, not by a misleading footnote in the Opinion of the Seventh Circuit.

Federal pre-emption (in this case symbolized by petitioner's status as a federal licensee) can establish in itself federal question jurisdiction, for purposes both of original suit and removal. See, *Rice* v. *Santa Fe Elevator Corp.,* 331 U. S. 218, 222 (1947), *aff'g in part, Board of Trade* v. *Illinois Commerce Commission,* 156 F. 2d 33, 34 (C. A. 7, 1946); Wright, Miller & Cooper, "Federal Practice and Procedure: Jurisdiction" (Vol. 14) § 3722, pp. 566-9 (1976); 1A, Part 1, *Moore's Federal Practice* § 0.160, pp. 185-8; *First Fed. S.&L., Boston* v. *Greenwald,* 591 F. 2d 417, 422-3 (C. A. 1, 1979).

Although RCRA permits State "*requirements,* including those for site selection, which are more stringent than those imposed by such [RCRA] regulations" (42 U. S. C. A. Sec. 6929), RCRA *does* pre-empt state action designed, not to regulate, but to shut down entirely a hazardous waste disposal operation which is licensed under federal law as part of a

national network of disposal sites and which is the only site in Illinois licensed to receive, and receiving, all types of hazardous wastes, both from Illinois and from out-of-state. Should the Illinois Attorney General succeed here against petitioner, he will have opted Illinois out of a critical part of the national waste disposal scheme. *Cf, Hines* v. *Davidowitz,* 312 U. S. 52, 67 (1941). See, Andersen, "The Resource Conservation And Recovery Act of 1976: Closing The Gap", 1978 *Wisconsin Law Review* 633, at pp. 684-5, 698-9; RCRA Regulations, Appendix 4, hereto (40 CFR 123.32(a), *Fed. Reg.,*Vol. 45, No. 98, 5/19/80, p. 33395); *Philadelphia* v. *New Jersey,* 437 U. S. 617, 628 (1978).

CONCLUSION

For the reasons that the Opinion below directly conflicts with an unbroken line of decisions by this Court, explicitly conflicts both on points of federal question and diversity jurisdiction with decisions of other Circuit Courts of Appeal, and adopts rulings on important matters of judicial and statutory policy which depart grossly from the usual course of judicial decision, a writ of certiorari should issue to review the judgment and opinion of the Seventh Circuit.

Respectfully submitted,

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November 12, 1981

APPENDICES

APPENDIX 1

In the

United States Court of Appeals

For the Seventh Circuit

No. 80-2239

NUCLEAR ENGINEERING COMPANY,

Plaintiff-Appellee,

v.

WILLIAM J. SCOTT,

Defendant-Appellant.

ILLINOIS ex rel. WILLIAM J. SCOTT,

Plaintiff-Appellant,

v.

NUCLEAR ENGINEERING COMPANY,

Defendant-Appellee.

Appeal from the United States District Court for the Central District of Illinois.
Nos. 1075 and 1094—Robert D. Morgan, *Judge.*

ARGUED FEBRUARY 27, 1981—DECIDED AUGUST 26, 1981

Before PELL and SPRECHER, *Circuit Judges* and MAROVITZ, *Senior District Judge.**

MAROVITZ, *Senior District Judge.* These two consolidated cases concern the operation of a hazardous waste

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* The Honorable Abraham L. Marovitz, Senior District Judge of the Northern District of Illinois, is sitting by designation.

storage facility by Nuclear Engineering Company (NEC) at Sheffield, Illinois. This interlocutory appeal, brought pursuant to 28 U.S.C. § 1292(b), raises issues pertaining to the existence of federal subject matter jurisdiction over the two cases. For the reasons set forth below, we find that the district court is without jurisdiction to entertain these actions.

I. *Introduction.*

In a sense, the origin of the dispute underlying these cases can be traced to a press conference held on April 22, 1980[1] by former Illinois Attorney General William J. Scott. At the press conference, Scott announced that he intended to commence lawsuits against persons he believed to be violating Illinois' environmental protection laws, among whom was NEC for its operation of the Sheffield facility. The Sheffield facility is used for the storage of explosives and chemical and radioactive wastes.

On May 8, 1980, NEC filed an action in United States District Court for the Central District of Illinois against Scott as an individual and in his official capacity (the "NEC action"), alleging jurisdiction under 28 U.S.C. §§ 1331(a), 1332(a), and 2201-02. The federal law gravamen of NEC's complaint is that Scott has threatened to require NEC to cease operation of the Sheffield facility and to remove all hazardous wastes now stored there in violation of NEC's fourteenth amendment due process rights and its rights under the Resource Conservation and Recovery Act of 1976, 42 U.S.C. §§ 6901-6987 (the "RCRA").[2] NEC states in its complaint that its Sheffield facility is operated pursuant to all permits required by the Illinois Environmental Protection Act (the "IEPA")

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[1] The press conference was scheduled in observation of the tenth anniversary of "Earth Day," a day commemorating the environmental protection movement.

[2] The RCRA establishes a system of permits and other regulatory measures concerning hazardous waste and solid waste management facilities.

Ill. Rev. Stat. ch. 111½, §§ 1001-51, and is subject to the provisions of the RCRA relating to the disposal of hazardous wastes.[3] NEC alleges that if Scott were to institute proceedings against it to force the discontinuance of its operation of the Sheffield facility, Scott would be "acting unlawfully outside the powers of his office."

NEC claims that Scott's alleged threatened interruption of its services is injuring it in that current and potential customers are seeking the services of a handler of hazardous wastes whose services are not so threatened. NEC also alleges that Scott's threatened action is causing it injury in that its ability to obtain financial investment is being impaired. NEC seeks a declaratory judgment providing that as long as it complies with the RCRA and all state and local law with respect to its operation of the Sheffield facility it may continue the operation of that facility. Further, NEC requests that an injunction be issued restraining Scott from instituting any civil action against NEC as to its operation of the Sheffield facility.

On May 20, 1980, Scott filed a four-count complaint against NEC and Teledyne Industries, Inc.[4] in Illinois Circuit Court for the Thirteenth Judicial Circuit (the "Illinois action"), alleging that the Sheffield facility was being operated in violation of state statutory and common law. Specifically, Counts I and II assert violations of provisions of the IEPA, Count III alleges a

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[3] At the time of the filing of NEC's complaint, the first set of regulations promulgated under the RCRA had yet to become effective. Such regulations were published on May 19, 1980, 45 Fed. Reg. 33418 (May 19, 1980), and, insofar as they relate to NEC's claims, made effective on November 19, 1980. 40 C.F.R. §§ 122-24, 260-65. As of November 19, 1980, NEC's Sheffield facility has been operating pursuant to a federal permit issued under the RCRA. *See* 42 U.S.C. 6925(e). After November 19, 1980, NEC moved to file an amended complaint setting forth with greater particularity its theory based on the RCRA. That motion remains pending in the district court.

[4] Teledyne Industries, Inc. is the parent corporation of NEC.

violation of Ill. Rev. Stat. ch. 14, §§ 11 and 12,[5] and Count IV alleges a common law nuisance. The Illinois action seeks an injunction requiring NEC to cease the operation of its Sheffield facility and to remove all hazardous wastes stored there. The Illinois action also seeks the assessment of penalties for each violation of state law alleged and for each day of continued operation of the facility in violation of state law.

On the same day the Illinois action was filed, Illinois moved in district court to dismiss the NEC action asserting, *inter alia*, that the district court lacked subject matter jurisdiction over the NEC action and, in the alternative, that the district court should abstain from hearing the NEC action. On May 28, 1980, NEC removed the Illinois action to United States District Court for the Central District of Illinois, alleging jurisdiction pursuant to 28 U.S.C. §§ 1331(a) and 1132(a). On the following day, Illinois moved to remand its action to state court, denying the existence of federal subject matter jurisdiction over its claims.

On May 29, 1980, the district court heard pending motions in both the NEC and Illinois actions, including Illinois' motion to dismiss and its motion to remand. Both of those motions were denied by the district court without the issuance of a written opinion. The district court that day also consolidated the two actions. On June 20, 1980, Illinois filed a motion requesting that the district court reconsider its denial of Illinois' motions, enter findings in support of its rulings on Illinois' motions, and, in the event reconsideration was denied, certify its order denying Illinois' motions for interlocutory appeal pursuant to 28 U.S.C. § 1292(b). On June 25, 1980, the district court denied Illinois' motion insofar as it sought reconsideration and to obtain the entry of

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[5] These provisions comprise a statute entitled: "An Act in Relation to the Prevention and Abatement of Air, Land and Water Pollution." *See* Ill. Rev. Stat. ch. 14, § 11.

findings,[6] but granted Illinois' request that the district court certify its denials of Illinois' motions for interlocutory appeal pursuant of 28 U.S.C. § 1292(b). In its certification order of June 25, the district court found that the question of whether diversity jurisdiction exists over the two actions was a controlling question of law about which there is a substantial difference of opinion. On July 1, 1980, NEC moved to amend the district court's June 25, 1980 order "so as to certify the issue of federal question jurisdiction as a controlling question of law in addition to the issue of diversity jurisdiction." On July 3, 1980, the district court granted NEC's motion. Illinois filed its request for interlocutory appeal on July 11, 1980. Thereafter, we granted leave to appeal.

II. *Appellate Jurisdiction.*

Before turning to the substantive issues raised by this appeal, we must address a rather thorny question pertaining to our appellate jurisdiction to hear this appeal pursuant to 28 U.S.C. § 1292(b). Appeals brought pursuant to section 1292(b) must be filed within 10 days of the entry of the certification order, and that requirement is jurisdictional.[7] *E.g., Woods v. Baltimore*

[6] We find it lamentable that the district court declined to supply the parties and this Court with the benefit of the reasoning by which it arrived at its May 29 rulings, especially in view of the district court's own admission that the questions involved are difficult ones.

[7] 28 U.S.C. § 1292(b) provides:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: Provided, however, that application for an appeal

(Footnote continued on following page)

& Ohio R.R. Co., 441 F.2d 407, 408 (6th Cir. 1971). The district court's June 25 order of certification effectively commenced the 10 day period for appeal from the district court's order denying Illinois' motions to dismiss the NEC action and to remand the Illinois action.

The question presented is whether Illinois' appeal was timely filed even though filed more than 10 days after entry of the district court's June 25, 1980 order. Or, stated differently, the question presented is whether the 10 day period for purposes of appeal must be computed from the date of entry of the June 25, 1980 order or may instead be computed from the date of entry of the district court's July 3, 1980 order amending the June 25 order. The answer to this question determines whether the appeal is properly before the Court.

The instant jurisdictional question appears to have arisen from a fundamental misunderstanding shared by the parties and the district court as to the scope of a section 1292(b) appeal. The parties and the district court apparently interpret section 1292(b) as authorizing interlocutory appeal of specific legal questions, rather than from particular *orders*. The language and purpose of the statute and the applicable law, however, are to the contrary. *Civil Aeronautics Board v. Tour Travel Enterprises, Inc.*, 605 F.2d 998, 1003 n.12 (7th Cir. 1979); *Consolidated Express, Inc. v. New York Shipping Association*, 602 F.2d 494, 501-02 (3d Cir. 1979), *vacated*

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[7] *continued*

hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

When we accepted this appeal we were simply exercising that discretion vested with us pursuant to 28 U.S.C. § 1292(b). *See* C. Wright, A. Miller, and E. Cooper, *Federal Practice and Procedure* § 3929 at 140. Of course, whether we possess appellate jurisdiction over this appeal is not a matter within our discretion. The instant issue concerning our appellate jurisdiction was raised *sua sponte* prior to oral argument, but after the close of briefing. Both parties have addressed themselves to the issue during oral argument and by way of supplemental briefs.

on other grounds, 448 U.S. 901 (1980); *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974, 994-95 (2d Cir.), *cert. denied, Bersch v. Arthur Anderson & Co.*, 423 U.S. 1018 (1975); *see generally* Note, *Interlocutory Appeals in the Federal Courts under 28 U.S.C. § 1292(b)*, 88 Harv. L. Rev. 607, 628-29 (1975). Section 1292(b) permits appeals from *orders* involving "a controlling question of law as to which there is substantial ground for difference of opinion," not just the specific question. *Civil Aeronautics Board v. Tour Travel Enterprises, Inc.*, 605 F.2d at 1003 n.12. When an order is certified for appeal by a district court and appeal is accepted by a court of appeals all questions material to the order are properly before the court of appeals. To view section 1292(b) as allowing review of only the question of law making an order appealable would frustrate the utility of the section 1292(b) appeal process where, for example, the court of appeals affirms the order certified, based upon its agreement with the district court's resolution of the legal question, but fails to reach other questions material to the order that were erroneously decided by the district court. Hence, when the district court in the instant case on June 25, 1980 certified its order denying Illinois' motions, all material questions decided in that order, including the question of whether federal question jurisdiction existed over the cases, would have been properly before this Court if an appeal had been timely filed and accepted. The July 3, 1980 amendment to the June 25, 1980 order was therefore superfluous.

Clearly, this Court may not enlarge the time for filing an appeal pursuant to section 1292(b). Fed. R. App. P. 26(b). However, it is not so clear whether this Court may permit a district court to in effect enlarge the time for appealing from a certified order by vacating and reentering or amending an order of certification so as to arguably recommence the running of the 10 day period.[8]

[8] No rule expressly addresses this question. Rule 4(a) of the Federal Rules of Appellate Procedure empowers a district court to enlarge the time for filing an appeal as of right by thirty days upon a showing of excusable neglect. Rule 5 of the Federal Rules of Appellate Procedure, governing interlocutory appeals, contains no comparable provision.

That issue has been grappled with by few courts, all of them outside of this Circuit. *Braden v. University of Pittsburgh*, 552 F.2d 948 (3d Cir. 1977); *In re La Providencia Development Corp.*, 515 F.2d 94 (1st Cir. 1975); *Woods v. Baltimore & Ohio R.R. Co.*, 441 F.2d 407 (6th Cir. 1971); *Borskey v. American Pad & Textile Co.*, 296 F.2d 894 (5th Cir. 1961); *Nakhleh v. Chemical Construction Corp.*, 366 F. Supp. 1221 (S.D.N.Y. 1973). None of these cases resolved the precise issue before this Court, and the only principle common to most of the above decisions is that a district court may not reenter a certification order to enlarge the time for appeal when the failure to timely appeal from the original certification order was due solely to mere neglect of counsel. *E.g., Woods v. Baltimore & Ohio R.R. Co.*, 441 F.2d at 408. *But see In re La Providencia Development Corp.*, 515 F.2d at 95. *Nakhleh* and *Borskey* stand for the proposition that reentry of an order of certification will be given effect only if accompanied by reconsideration of some new issue relating to the merits of the order sought to be appealed from. *La Providencia*, on the other hand, implicitly sanctions reentry of a certification order if it will afford the parties a timely appellate decision. The most flexible approach is apparently that endorsed by the Third Circuit in *Braden* where the court gave effect to the reentry of a certification order upon consideration of the facts surrounding reentry of the certification order and all pertinent rules. While the most salient fact upon which the *Braden* court relied was that no timely appeal from the original certification order was taken due to the district court's failure to afford counsel timely notice of entry of the order, the *Braden* court also relied upon the fact that an appeal from the subsequently entered certification order had not caused the appellee any prejudice. *Braden v. University of Pittsburgh*, 552 F.2d at 954-55.

The purpose underlying section 1292(b) does not appear to figure prominently in any of the above cited decisions. In the absence of any definitive rule supplying a resolution of the sort of issue before us, we believe that the focus of our inquiry must be the purpose to be served by section 1292(b). Section 1292(b) was enacted

as one of the few exceptions to the "final judgment" rule for the important and salutary purposes of shortening the length of litigation and avoiding unnecessary work and expense by the courts and litigants. *Hearings on H.R. 6238 and H.R. 7260 Before Subcomm. No. 3 of House Comm. on the Judiciary*, 85th Cong., 2d Sess. at 14 (1958) (hereinafter cited as "House Hearings"); *see generally* Note, *Interlocutory Appeals in the Federal Courts under 28 U.S.C. § 1292(b)*, 88 Harv. L. Rev. at 610-12. In short, section 1292(b) was enacted to foster greater judicial efficiency. The procedural mechanism enacted to further this goal was the dual requirement that an appeal brought under section 1292(b) be both certified by the district court as likely to "materially advance the termination of the litigation" and, in its discretion, acceptable to the court of appeals for interlocutory appeal. *See House Hearings* at 14-15. As to the 10 day requirement, the only apparent Congressional intention was that section 1292(b) appeals be expeditiously brought so that the delay attendant an interlocutory appeal would be minimized. S. Rep. 2434, 85th Cong., 2d Sess. (1958). *See generally* C. Wright, A. Miller, E. Cooper *Federal Practice and Procedure* § 3929 at 154.

The *Nakhleh* court's rigid approach to the question of the appropriateness of an appeal from a recertified order does not permit a considered determination of whether appeal would be consonant with the purposes of section 1292(b). Accordingly, we decline to follow that approach. Instead we find that as long as a timely appeal from a recertified order will further the purpose of section 1292(b), taking into consideration all events transpiring between the entry of certification orders that bear upon the utility of a section 1292(b) appeal, the appeal should not be dismissed for want of appellate jurisdiction. *See* C. Wright, A. Miller, and E. Cooper *Federal Practice and Procedure* § 3929 at 154-55; Note, *Interlocutory Appeals in the Federal Courts Under 28 U.S.C. § 1292(b)*, 88 Harv. L. Rev. at 615-16. In this connection, the fact that a district court recertifies an order should be worthy of some weight by a court of appeals. As stated, whether to grant any timely section

1292(b) appeal is always a matter within the discretion of a court of appeals. In the context of an appeal pursuant to the recertified order, a court of appeals should be especially alert to any undue prejudice to a party when exercising that discretion.

Having established the appropriate inquiry, we find that the certification order of the district court of July 3, 1980 should be given effect and accordingly we find Illinois' appeal to have been timely filed. The district court's second certification order indicates that each of the jurisdictional bases of the Illinois and the NEC cases involved a "controlling question of law as to which there is a substantial ground for difference of opinion." Being jurisdictional questions, their resolution on appeal perforce promises to materially advance the ultimate resolution of this litigation and avoid unnecessary expense. *See generally McCorkle v. First Pennsylvania Banking & Trust Co.*, 459 F.2d 243, 251 (4th Cir. 1972); Note, *Interlocutory Appeals in the Federal Courts Under 28 U.S.C. § 1292(b)*, 88 Harv. L. Rev. at 611-12. The potential benefit to be derived from this section 1292(b) appeal is not diminished when weighed against the delay between the expiration of the time for appeal from the district court's initial certification order and the filing of Illinois' appeal. During that period of approximately a week, no events transpired that would render this interlocutory appeal less fruitful than if it had been timely brought from the initial certification order.

Further, the facts of this case are somewhat akin to those of *Braden* in that it was not wholly unreasonable for Illinois to believe that it had 10 days from the entry of the July 3 order in which to appeal. *Braden v. University of Pittsburgh*, 552 F.2d at 955. Assumedly, Illinois would have filed its appeal within 10 days of the July 25 order if NEC had not requested an amendment to that order during the 10 day period. The most prudent course for Illinois to have followed would have been to have done so anyway. However, as stated, Illinois apparently misunderstood the scope of a section 1292(b) appeal. Because the misunderstanding was somewhat encouraged by the district court's reentry of

the certification order in amended form, we find that it was not unreasonable for Illinois to consider the applicable 10 day period to commence on the date of entry of the amended order of certification.

Finally, we deem it significant that NEC was not prejudiced by Illinois' failure to file its appeal within 10 days of the district court's June 25, 1980 order. *See id.* at 955. Indeed, NEC has not urged dismissal of this appeal by reason of Illinois' failure to do so.

In sum, we find that we have jurisdiction to entertain Illinois' appeal from the district court's order of May 29, 1980 because Illinois' appeal was filed within 10 days after the district court's certification order of July 3, 1980.

III. *The Illinois Action.*

We now turn to a substantive review of the district court's May 29, 1980 order, addressing first its denial of Illinois' motion to remand the Illinois action to state court. Removal of the Illinois action was accomplished pursuant to the general removal statute, 28 U.S.C. § 1441.[9] The two requisites of removal are that the

[9] 28 U.S.C. § 1441 provides:

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

(Footnote continued on following page)

action was properly commenced in state court and that it could have been originally commenced in federal court. *Lambert Run Coal Co. v. Baltimore & Ohio R.R. Co.*, 258 U.S. 377, 382 (1922). Only the existence of the latter requisite is disputed herein. As stated, NEC asserts that the district court has jurisdiction over the Illinois action by virtue of its federal question jurisdiction and its diversity jurisdiction.

A. *Federal Question Jurisdiction.*

Jurisdictional questions are answered by reference to the time of the filing of an action, and the party asserting jurisdiction bears the burden of establishing its existence. *E.g., International Harvester Co. v. Deere & Co.*, 623 F.2d 1207, 1210 (7th Cir. 1980). The specific principles applicable to pleading federal question jurisdiction are well-settled. Federal question jurisdiction is properly invoked when a plaintiff pleads a claim that "arises under" federal law. 28 U.S.C. § 1331. A claim "arises under" federal law when federal law supplies an essential element of the claim. *E.g., Gully v. First National Bank*, 299 U.S. 109 (1936). Additionally, the federal claim must generally appear on the face of the complaint, unaided by any other pleadings, including a removal petition. *E.g., Arkansas v. Kansas & Texas Coal Co.*, 183 U.S. 185, 188 (1901). *American Invs-Co. Countryside, Inc. v. Riverdale Bank*, 596 F.2d 211, 216 (7th Cir. 1979). A qualification of this so-called "well-pleaded complaint" rule for determining jurisdiction is that a plaintiff may not deny a defendant his right to a federal forum by artfully disguising an essentially federal law claim in terms of state law. *Jones v. General Tire & Rubber Co.*, 541 F.2d 660, 664 (7th Cir. 1976).

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[9] *continued*

(c) Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters not otherwise within its original jurisdiction.

No. 80-2239

Whether the Illinois action "arises under" federal law is a question that need not long detain us. Illinois' complaint on its face asserts only state law claims. NEC's argument in this regard is, briefly stated, that questions pertaining to provisions of the RCRA and other federal law are inextricably bound up with Illinois's claim and that Illinois has artfully pleaded its claim to avoid any references to federal law.[10] Illinois' claims, however, are predicated upon state law that at most incorporates federal law in certain tangential respects. *See, e.g.*, Ill. Rev. Stat. ch. 111½, §§ 1003(g) and 1012(f).[11] Such state law

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[10] Significantly, however, NEC does not dispute that the RCRA does not pre-empt the body of state law upon which Illinois' claims are based insofar as they seek to impose upon the Sheffield facility standards more stringent than does the RCRA. *See* 42 U.S.C. § 6929. *See also Rettig v. Arlington Heights Federal Savings & Loan Association*, 405 F. Supp. 819, 823 (N.D. Ill. 1975).

[11] These provisions provide as follows:

§ 1003. Definitions

* * * * *

(g) "Hazardous waste" means a waste, or combination of wastes, which because of its quantity, concentration, or physical, chemical, or infectious characteristics may cause or significantly contribute to an increase in mortality or an increase in serious, irreversible, or incapacitating reversible, illness; or pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed, *and which has been identified, by characteristics or listing, as hazardous pursuant to Section 3001 of the Resource Conservation and Recovery Act of 1976, P.L. 94-580, or pursuant to Agency guidelines consistent with the requirements of this Act and Board regulations.* Hazardous waste does not include municipal waste. (footnote omitted) (emphasis supplied).

* * * *

§ 1012. Acts prohibited.

No person shall:

* * * *

(Footnote continued on following page)

incorporation of federal law does not fairly allow Illinois' state law claims to be construed as essentially federal in character. *See, e.g., United Air Lines, Inc. v. Division of Industrial Safety of the Department of Industrial Relations*, 633 F.2d 814, 816 (9th Cir. 1980). *See also Association of Westinghouse Salaried Employees v. Westinghouse Electric Corp.*, 348 U.S. 437, 450 (1955), *overruled on other grounds, Smith v. Evening News Association*, 371 U.S. 195 (1962). Accordingly, we find there exists no federal question jurisdiction over the Illinois action.[12]

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[11] *continued*

(f) Cause, threaten or allow the discharge of any contaminant into the waters of the State, as defined herein, including but not limited to, waters to any sewage works, or into any well or from any point source within the State, without an NPDES permit for point source discharges issued by the Agency under Section 39(b) of this Act, or in violation of any term or condition imposed by such permit, or in violation of any NPDES permit filing requirement established under Section 39(b), or in violation of any regulations adopted by the Board or of any order adopted by the Board with respect to the NPDES program.

No permit shall be required under this subsection and under Section 39(b) of this Act for discharge for which a permit is not required under the Federal Water Pollution Control Act Amendments of 1972 (P.L. 92-500) and regulations pursuant thereto.

For all purposes of this Act, a permit issued by the Administrator of the United States Environmental Protection Agency under Section 402 of the Federal Water Pollution Control Act Amendments of 1972 (P.L. 92-500) shall be deemed to be a permit issued by the Agency pursuant to Section 39(b) of this Act. However, this shall not apply to the exclusion from the requirement of an operating permit provided under Section 13(b)(i). (footnotes omitted) (emphasis supplied).

[12] Recently, the United States District Court for the Middle District of Louisiana remanded a private action brought against an operator of a hazardous waste disposal facility that

(Footnote continued on following page)

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B. *Diversity Jurisdiction.*

Removal was nonetheless providently allowed if the district court has diversity jurisdiction over the Illinois action. Diversity jurisdiction extends to suits between parties whose state citizenship is completely diverse. 28 U.S.C. § 1332.[13] NEC is a California corporation with its principal place of business located within Kentucky, and is consequently a citizen of both California and Kentucky for diversity purposes. 28 U.S.C. § 1332(c). States are not considered "citizens" for purposes of diversity jurisdiction and therefore diversity jurisdiction may not be asserted over an action to which a state is a real party in interest. *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459, 464 (1945); *State Highway Commission v. Utah Construction Co.*, 278 U.S. 194, 199-200 (1929); *Fitts v. McGhee*, 172 U.S. 516, 529 (1899). When a state official is a party to a proceeding over which diversity jurisdiction is alleged, whether the respective state is itself the real party in interest is a question to be determined from the "essential nature and effect of the proceeding." *Ford Motor Co. v. Department of Treasury*, 323 U.S. at 464.

Thus, the issue to be resolved to ascertain if diversity jurisdiction exists over the Illinois action is whether that action is, in essence, brought by the State of Illinois. If so, the parties to that action are not of diverse "citizenship" within the meaning of 28 U.S.C. § 1332. That Scott brought the Illinois action in his official capacity on behalf of the State of Illinois is abundantly clear from

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[12] *continued*
asserted violations of Louisiana law. *McCastle v. Rollins Environmental Services*, No. 81-185-A (M.D. La., May 13, 1981) (memorandum opinion), *motion for reconsideration denied*, (June 5, 1981) (memorandum opinion). In *McCastle* the district court rejected arguments in support of federal question jurisdiction based on the RCRA similar to those urged by NEC herein. We note our concurrence with the reasoning of the *McCastle* opinions.

[13] It is undisputed that the Illinois action satisfies the $10,000 amount in controversy requirement imposed by section 1332.

an examination of the complaint filed in the Illinois action. *See State Highway Commission of Wyoming v. Utah Construction Co.*, 278 U.S. 194; *Fitts v. McGhee*, 172 U.S. 516; *Olsen v. Doerfler*, 225 F. Supp. 540, 541 (E.D. Mich. 1963). We therefore find that the district court has no jurisdiction over the Illinois action pursuant to 28 U.S.C. § 1332.

The postulate of NEC's argument that the district court possesses diversity jurisdiction over the Illinois action is that Scott in his individual capacity is the real party plaintiff to that action because his commencement of the action constitutes an act outside the scope of his lawful authority. That postulate has its theoretical origins in the Supreme Court's decision in *Ex Parte Young*, 209 U.S. 123 (1908), and was apparently first cast in the form relied upon by NEC in *Ohio ex rel. Seney v. Swift Co.*, 270 F. 141 (6th Cir.), *cert. denied*, 257 U.S. 633 (1921). *Ex Parte Young* is pertinent to NEC's argument inasmuch as the Court ruled therein that the eleventh amendment is no bar to a suit seeking prospective relief from a state official if the official has exercised his authority unconstitutionally. *Ex Parte Young*, 209 U.S. at 159-60. Relying on that holding of *Ex Parte Young*, *Seney* held that an action brought by a state official to enforce a statute alleged by the defendant to be unconstitutional can only be deemed brought by the official in his individual capacity. *Ohio ex rel. Seney v. Swift Co.*, 270 F. at 150-52. Therefore, the *Seney* court reasoned, the rule of law providing that states are not citizens for purposes of 28 U.S.C. § 1332 did not preclude its assertion of diversity jurisdiction over the action. *Id.*

We decline to follow the reasoning of *Seney*. The fiction created by *Ex Parte Young*—*i.e.*, that a constitutional claim for prospective relief against a state official is not an action against the state for eleventh amendment purposes—has never been applied by the Supreme Court or this Circuit to determine whether a state is a party to an action for purposes of diversity jurisdiction. The proposition advanced by the *Seney* court has apparently been arguably embraced by but one reported decision, *Mouton v. Sinclair Oil & Gas Co.*, 410 F.2d 717

(5th Cir. 1969), *cert. denied*, 398 U.S. 957 (1970), while it has been generally criticized. *Eure v. NVF Co.*, 481 F. Supp. 639, 641 (E.D.N.C. 1979); *National Market Reports, Inc. v. Brown*, 443 F. Supp. 1301, 1305 n.6 (S.D. W.Va. 1978); *State Tax Commission v. Union Carbide Corp.*, 386 F. Supp. 250, 253 n.7 (D. Idaho 1974). *See also Geeslin v. Merriman*, 527 F.2d 452 (6th Cir. 1975).

The fiction of *Ex Parte Young*, which merits that decision being considered a "landmark in constitutional law," C. Wright, A. Miller, and E. Cooper, *Federal Practice and Procedure*, § 4231 at 359,[14] was created to further important interests wholly inapposite to Congress' grant of federal jurisdiction pursuant to 28 U.S.C. § 1332.[15] The *Seney* decision does not reveal, and we cannot conceive, of any compelling reason to employ the fiction of *Ex Parte Young* to find diversity jurisdiction over actions such as the Illinois action. Concededly, to decline to so apply that fiction to questions of diversity jurisdiction produces the anomalous result that a state official alleged to have acted in an unconstitutional fashion may be considered a "state actor" for some purposes and not for others. However, we do not find that fact to weigh in as persuasive support for NEC's position. Indeed, a similar anomaly was sanctioned in *Ex Parte Young* in that the Court there found a state official alleged to have performed his duties in an unconstitutional manner to not be a "state actor" for certain eleventh amendment purposes, but to be a "state actor" for fourteenth amendment purposes.

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[14] *See also* Baker, *Federalism and the Eleventh Amendment*, 48 U. Colo. L. Rev. 139, 157-58 (1977); L. Tribe *American Constitutional Law* at 144-47 (1978).

[15] *Ex Parte Young* was born of the need to enforce the United States Constitution against state officials, *e.g.*, C. Wright, H. Miller, and E. Cooper, *Federal Practice and Procedure* § 4231 at 352, while 28 U.S.C. § 1332 was enacted to provide a neutral forum for suits between citizens of different states. *Pease v. Peck*, 59 U.S. (18 How.) 595 (1856).

Therefore, we find that the district court is without jurisdiction pursuant to 28 U.S.C. § 1332 to decide the Illinois action. As a result, we find that removal of the Illinois action to the district court was improvidently had. The Illinois action shall be remanded to the district court only for the purposes of entertaining a request by Illinois for costs, *see* 28 U.S.C. § 1447(c), and to enter an order remanding this cause to state court.

IV. *The NEC Action.*

The NEC action also presents jurisdictional questions pertaining to both diversity and federal question jurisdiction. Before turning to those questions, however, we must address the separate and distinct jurisdictional question of constitutional dimension of whether the NEC action presents to the district court an actual controversy for resolution. We find that it does not.[16]

As already stated, jurisdictional matters are determined by reference to the time when the action was commenced, and the proponent of federal jurisdiction bears the burden of establishing the existence of such jurisdiction. *International Harvester Co. v. Deere & Co.*, 623 F.2d at 1210. The test to be applied to determine the existence of an actual controversy in the context of a declaratory judgment action is "whether . . . there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 273 (1941). *Accord, Lake Carriers' Association v. MacMullan*, 406 U.S. 498, 506 (1972). While this test may be easily stated, it is often difficult to apply to a given factual pattern. However, we easily conclude that the NEC action presented no actual controversy when

[16] Unfortunately, this issue was not adequately addressed by the parties. We, of course, may not ignore any doubts as to our jurisdiction, however they may arise. *Association of American Medical Societies v. Califano*, 569 F.2d 101, 111 (D.C. Cir. 1977).

filed. *See Public Service Commission of Utah v. Wycoff Co.*, 344 U.S. 237 (1952).

At the time NEC's complaint was filed, the alleged controversy between it and defendant Scott was based entirely upon his April 22, 1980 announcement that he intended at some future date to bring an action against NEC alleging violations of Illinois' environmental protection laws. Of course, a plaintiff need not always await the actual commencement of enforcement proceedings to challenge the authority under which those proceedings would be brought. *E.g., Babbitt v. United Farm Workers*, 442 U.S. 289, 298 (1979); *Lake Carriers' Association v. MacMullan*, 406 U.S. at 507-08. However, for such an action to present a justiciable controversy the threat of enforcement must have immediate coercive consequences of some sort upon the plaintiff. *Id.* at 508 n.12; *Poe v. Ullman*, 367 U.S. 497, 508 (1961); *cf. Public Service Commission of Utah v. Wycoff Co.*, 344 U.S. at 245.

The only allegation in NEC's complaint that Scott's threatened action is causing immediate consequences to NEC is its allegation that existing and potential customers and potential investors are being lost. When threatened governmental action causes immediate business costs, an "actual controversy" certainly exists. *Bethlehem Steel Corp. v. United States Environmental Protection Agency*, 536 F.2d 156, 164 (7th Cir. 1976). Uncertain or speculative business injury, on the other hand, will not support a finding that an "actual controversy" exists. *Id.* Our careful examination of the record in this case reveals not a shred of evidence in support of NEC's allegation of immediate business injury. Nor has NEC even alluded to this allegation as a basis for jurisdiction during the course of this appeal. Illinois having challenged NEC's assertion that jurisdiction exists over its action, it was incumbent upon NEC to support its jurisdictional allegations of fact by competent evidence. *Grafon Corp. v. Hausermann*, 602 F.2d 781, 783 (7th Cir. 1979). *See generally* 1 *Moore's Federal Practice* ¶0.06[4] at 627. NEC has not done so with respect to its allegation that Scott's threatened action caused it business injury, and

therefore we find that NEC has failed to meet its burden as to this jurisdictional allegation.

The facts of this case are remarkably similar to those in *Wycoff*. In that case, a business engaged in the transportation of film between points within the State of Utah filed an action against the Utah Public Service Commission seeking declaratory and injunctive relief. The *Wycoff* plaintiff's claim was that because its operations were conducted pursuant to authority from the Interstate Commerce Commission, the court should declare those operations immune from Utah's applicable regulatory scheme. The facts in *Wycoff* indicate that the plaintiff's fear of enforcement of that scheme was by no means unfounded. However, that threat did not give rise to any immediate coercive consequences. The Supreme Court ruled that the *Wycoff* plaintiff's claim presented no actual controversy when it merely sought "to *guard against the possibility* that said Commission would attempt to prevent respondent from operating under its certificate from the Interstate Commerce Commission." *Public Service Commission of Utah v. Wycoff Co.*, 344 U.S. at 244 (emphasis in original). *See also American Invs-Co. Countryside, Inc. v. Riverdale Bank*, 596 F.2d at 216. Similarly, the NEC action was filed merely to immunize it against an anticipated enforcement action by Scott when that threatened action had no immediate consequences to NEC so as to give rise to an "actual controversy."

The *Lake Carriers'* case is also illustrative of the absence of an actual controversy between NEC and Scott at the time of the filing of this action. In *Lake Carriers'*, the plaintiffs sought a declaration that a Michigan statute regulating sewage discharge impinged upon their federal rights. At the time the action was commenced, the state officials had yet to seek compliance with the statute by way of an enforcement proceeding. But because state officials were actively employing the threat of future enforcement to obtain current compliance with certain provisions of the statute, the Court found the controversy presented to be sufficiently real and immediate. *Lake Carriers' Association v. MacMul-*

lan, 406 U.S. at 507-08. *Cf. Bethlehem Steel Corp. v. United States Environmental Protection Agency*, 536 F.2d at 164. NEC did not allege that Scott's threatened action coerced it into compliance with any statute or regulation. Indeed, NEC was operating the Sheffield facility when it commenced its action and it alleges that its operation of the facility has at all times been in full compliance with all applicable Illinois law.

Finally, that NEC's action seeks merely an advisory opinion is perhaps best demonstrated by an examination of NEC's prayer for relief, which requests that the district court "enter a judgment declaring that so long as plaintiff complies with The Resource Conservation and Recovery Act of 1976, with all valid State and local laws, and with the regulations, licenses and permits issued by said governmental authorities, plaintiff's operation of the . . . [Sheffield facility] is lawful and may be continued." By requesting this relief, NEC does not seek to have the district court declare the rights of parties involved in a concrete controversy, but simply seeks to have the district court engage in a tautologous exercise.

* * *

Since NEC's complaint presented no actual controversy when filed, the district court should have dismissed the action. This Court having so ruled, it is not necessary for us to reach the question of whether the district court had subject matter jurisdiction over the NEC action pursuant to its federal question or diversity jurisdiction. Because, however, the subsequent filing of the Illinois action has caused the controversy between NEC and Illinois to ripen into an "actual controversy" that apparently will imminently present itself to the district court, we feel compelled to comment upon the question of subject matter jurisdiction over NEC's claims viewed in light of the filing of the Illinois action.

NEC's federal law claims are that the Illinois action seeks to work an unconstitutional taking of NEC's property and that its compliance with the RCRA immunizes it from the claims asserted in the Illinois action. Illinois argues that these claims do not "arise under" federal law

because they are without meaning except insofar as they constitute defenses to state law claims. We agree.

It is well-settled that the Declaratory Judgment Act, 28 U.S.C. §§ 2201-02, confers no additional jurisdiction upon the federal courts. *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 671 (1950). When a declaratory judgment plaintiff asserts a claim that is in the nature of a defense to a threatened or pending coercive action, the character of the threatened or pending coercive action determines whether federal question jurisdiction exists over the declaratory judgment action. *Public Service Commission of Utah v. Wycoff Co.*,[17] 344 U.S. at 248; *United Air Lines v. Division of Industrial Safety of the Department of Industrial Relations*, 633 F.2d at 816-17; *Milprint, Inc. v. Curwood, Inc.*, 562 F.2d 418, 421-22 (7th Cir. 1977). In this manner, the well-pleaded complaint rule of pleading federal question jurisdiction is given effect in the context of declaratory judgment actions.[18]

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[17] NEC correctly points out that *Wycoff's* discussion of federal question jurisdiction is dictum since the *Wycoff* Court determined earlier in its opinion that the case presented no "actual controversy." NEC further argues that the *Wycoff* dictum and the progeny it spawned, *e.g.*, *United Air Lines v. Division of Industrial Safety of the Department of Industrial Relations*, 633 F.2d at 816-17; *First Federal Savings & Loan Association of Boston v. Greenwald*, 591 F.2d 417, 423 n.8 (1st Cir. 1979); *Milprint, Inc. v. Curwood, Inc.*, 562 F.2d at 421-22; *Rath Packing Co. v. Becker*, 530 F.2d 1295, 1305-06 (5th Cir. 1975) *aff'd*, 430 U.S. 519 (1977), misconstrue the scope of federal question jurisdiction. *See Braniff International, Inc. v. Florida Public Service Commission*, 576 F.2d 1100, 1104-06 (5th Cir. 1978). We disagree. The principles embodied in the *Wycoff* dictum are fully consistent with the logic of the holding in *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. at 671, *see Milprint, Inc. v. Curwood Co.*, 562 F.2d at 421-22, and remain viable in this Circuit. *Precision Shooting Co. v. Allen*, 646 F.2d 313, 315 (7th Cir. 1981).

[18] We find it insignificant that NEC also seeks injunctive relief. NEC's claim for injunctive relief is entirely premised upon the success of its claim for declaratory relief, seeking only to give effect to the declaratory relief sought. Nor do we reach any issue relating to the propriety of NEC's claim for injunctive relief.

Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. at 673-74. *See generally* Field, *The Uncertain Nature of Federal Jurisdiction* 22 Wm. & Mary L. Rev. 683, 689 (1981); Cohen, *The Broken Compass: The Requirement that a Case Arise "Directly" Under Federal Law*, 115 U.Pa.L. Rev. 890, 909 (1967).

Viewed in the light cast by these jurisdictional principles, NEC's purported federal law claims are illuminated as claims that do not "arise under" federal law. Rather, NEC's claims derive their meaning and substance wholly from Illinois' once threatened, and now pending, action, an action that we have already determined sets forth exclusively state law claims. NEC's claims implicate federal law only to the extent federal law affords NEC a defense to the Illinois action.[19] Consequently, NEC's complaint presents no claim that "arises under" federal law.

The question of whether the district court has diversity jurisdiction over the NEC action is controlled by our discussion in Part II-B *supra*. As support for the district court's asserted jurisdiction over the NEC action, NEC again advances the reasoning underlying the *Seney* decision rejected by us in Part II-B *supra*. NEC's action against Scott is essentially one against the State of Illinois; therefore, no diversity of citizenship exists between the parties to the NEC action. *See, e.g., State Highway Commission of Wyoming v. Utah Construction Co.*, 278 U.S. at 199-200; *Fitts v. McGhee*, 172 U.S. at 529; *Olsen v. Doefler*, 225 F. Supp. at 541.

Lastly, in view of the foregoing discussion, we do not reach Illinois' abstention argument with respect to the NEC action or NEC's motion to strike that argument from appellate consideration because allegedly not set forth in Illinois' initial brief to this Court.

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[19] Accordingly, the NEC action is distinguishable from actions brought to challenge threatened or pending enforcement of state law where such enforcement implicates federal rights apart from being a possible defense to such enforcement. *See, e.g., Rath Packing Co. v. Becker*, 530 F.2d at 1305-06.

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V. *Conclusion*

We conclude that the district court erred both when it denied Illinois' motion to remand its action and when it denied Illinois' motion to dismiss the NEC action. The Illinois action is remanded to the district court only so that it may consider any request by Illinois for costs pursuant to 28 U.S.C. § 1447(c) and for entry of an order remanding the action to the appropriate state court. As to the NEC action, the district court is instructed to enter an order dismissing that action for want of jurisdiction as explained in this opinion. Dismissal of that action is, of course, without prejudice. *E.g., Exchange National Bank of Chicago v. Touche Ross & Co.*, 544 F.2d 1126, 1130-31 (2d Cir. 1976). Accordingly, the order of the district court is,

REVERSED AND REMANDED.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

USCA 4969—Midwest Law Printing Co., Inc., Chicago—8-26-81—350

APPENDIX 2

Order, entered October 9, 1981, in Case No. 80-2239 by the United States Court of Appeals For the Seventh Circuit, before Hon. Wilbur F. Pell, Jr., Circuit Judge, Hon. Robert A. Sprecher, Circuit Judge, and Hon. Abraham L. Marovitz, Senior District Judge (sitting by designation):

> On consideration of the petition for rehearing and suggestion for rehearing en banc filed in the above-entitled cause by Nuclear Engineering Co., Inc., plaintiff-appellee and defendant-appellee, no judge in active service has requested a vote thereon although the attention of all active judges was directed to the conflict between the opinion of the panel and Ohio ex rel. Seney v. Swift Co., 270 F. 141 (6th Cir.), cert. denied, 257 U.S. 633 (1921) pursuant to Circuit Rule 16(e), and all of the judges on the original panel have voted to deny a rehearing. Accordingly,
>
> IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

APPENDIX 3

Order, entered October 19, 1981, in Case No. 80-2239 by the United States Court of Appeals For the Seventh Circuit, before Hon. Wilbur F. Pell, Jr., Circuit Judge:

> This matter comes before the court for its consideration upon "MOTION TO SUBSTITUTE AND FOR STAY OF MANDATE" filed herein on October 16, 1981, by counsel for Nuclear Engineering Company,
>
> On consideration thereof,
>
> IT IS ORDERED that the mandate of this court is hereby STAYED to and including November 18, 1981.
>
> IT IS FURTHER ORDERED that counsel for the appellant respond, on or before November 2, 1981, to the appellee's motion to substitute.

APPENDIX 4

STATUTORY PROVISIONS INVOLVED

28 U.S.C. Sec. 1331.

"(a) The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws or treaties of the United States."

28 U.S.C. Sec. 1332.

"(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between - (1) citizens of different States."

28 U.S.C. Sec. 1337.

"(a) The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce..."

28 U.S.C. Sec. 1343.

"(a) The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:...(3) To redress the deprivation, under color of any State law, statute...or usage, of any right, privilege or immunity secured by the Constitution of the United States..."

28 U.S.C. Sec. 1441.

"(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought."

28 U.S.C. Sec. 2201.

"In a case of actual controversy within its jurisdiction...any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought."

42 U.S.C.A. Sec 6901 et seq, the Resource Conservation and Recovery Act of 1976 ("RCRA").

RCRA Regulations and Explanatory Preambles:

40 CFR 123.32.

"To obtain approval, a State program must be consistent with the Federal program and State programs applicable in other States and in particular must comply with the provisions below...

(a) Any aspect of the State program which unreasonably restricts, impedes, or operates as a ban on the free movement across the State border of hazardous wastes from or to other States for treatment, storage, or disposal

at facilities authorized to operate under the Federal or an approved State program shall be deemed inconsistent."

Explanatory Preamble to §123.32 of RCRA Regulations, Federal Register, Vol. 45, No. 98, Monday, May 19, 1980, p. 33395:

"EPA believes that State requirements which forbid the construction or operation of hazardous waste disposal facilities could be subject to attack by the same reasoning adopted by the courts that have struck down transportation bans. A state that refuses entirely to allow a necessary part of national commerce - the disposal of hazardous wastes - to take place within its boundaries is impeding the flow of interstate commerce just as much as a State that refuses to allow the transportation of those wastes. The interstate commerce concerns involved here are underlined by the establishment through RCRA of a national regulatory scheme, even though that scheme is

not on its face preemptive. Accordingly, State programs which contain provisions that prohibit treatment, storage or disposal of hazardous waste within the State, will be deemed inconsistent if the prohibition has no basis in human health or environmental protection."

Opposition

Office - Supreme Court, U.S.
FILED
FEB 4 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-900

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A.D., 1981

NUCLEAR ENGINEERING COMPANY, INC.,

Petitioner,

v.

TYRONE C. FAHNER, Individually and as Attorney General of Illinois,

Respondent.

and

PEOPLE OF THE STATE OF ILLINOIS, ex rel. TYRONE C. FAHNER, Attorney General of Illinois,

Respondent,

v.

NUCLEAR ENGINEERING COMPANY, INC., a California corporation,

Petitioner.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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SCHNEPP & BARNES PRINTERS, INC., SPRINGFIELD, ILL.

I. QUESTIONS PRESENTED FOR REVIEW

Respondents, People of the State of Illinois and Tyrone C. Fahner, Attorney General of Illinois, disagree that the decision of the Seventh Circuit Court of Appeals raises any issues this Court should review under the criteria stated in Rule 17.1, U.S. Sup. Ct. Rule 17.1, 28 U.S.C.A. (1980).

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Chandler v. O'Bryan, 445 F.2d 1045 (10th Cir. 1971) 10

City of Chicago v. Railroad Transfer Service, 357, 351, 87 S. Ct. 1095, 18 L.Ed. 2d 143 (1967) 15

City of Chicago v. Railroad Transfer Service, 357 U.S. 77, 78 S. Ct. 1063, 2 L.Ed. 2d 1174 (1958) 15

Commonwealth v. Norman, 249 Mass. 123, 144 N.E. 66 (1924) 13

Eure v. NVF Co., 481 F. Supp. 639 (E.D.N.C. 1979) 13

Ex parte Young, 209 U.S. 123, 28 S. Ct. 441, 52 L.Ed. 714 (1908) 12

Gully v. First National Bank in Meridian, 299 U.S. 109, 57 S. Ct. 96, 81 L.Ed. 70 (1936) 17

Hicks v. Miranda, 422 U.S. 332, 95 S. Ct. 2281, 45 L.Ed. 2d 223 (1975) 10

Illinois v. Gorsuch, D.C.D.C. Nos. 78-1689, 78-1715, 78-1734, and 78-1899, Order of Judge Gesell (11-13-81), 12 *Environmental Reporter* 891 (11-20-81) 8

Jones v. Rath Packing Co., 430 U.S. 519, 97 S. Ct. 1305, 51 L.Ed. 2d 604 (1977) 10

Lake Carrier's Assn. v. MacMullan, 406 U.S. 498, 508; 92 S. Ct. 1749, 1756; 32 L.Ed. 2d 257 (1922) 15, 16

McCorkle v. First Pennsylvania Banking and Trust Co., 459 F.2d 243 (4th Cir. 1972) 10

Milprint, Inc. v. Curwood, Inc., 562 F.2d 418 (7th Cir. 1977) 10

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Moore v. Sims, 442 U.S. 415; 99 S. Ct. 2371, 2381; 60 L.Ed. 2d 994 (1979) 10-11

Mouton v. Sinclair Oil and Gas Co., 410 F.2d 717 (5th Cir. 1969), *cert. den.*, 398 U.S. 957 (1970) 13

National Market Reports, Inc. v. Brown, 443 F. Supp. 1301 (S.D.W.Va. 1978) 13

Olson v. Doerfler, 225 F. Supp. 540 (6th Cir. 1963) 13

Philadelphia v. New Jersey, 437 U.S. 617, 98 S. Ct. 2531, 57 L.Ed. 2d 475 (1978) 16, 17, 18

Public Service Commission of Utah v. Wycoff Co., Inc., 344 U.S. 237, 73 S. Ct. 236, 97 L.Ed. 291 (1952) 9-10

Rath Packing Co. v. Becker, 530 F.2d 1295 (9th Cir. 1975) 10

Samuels v. Mackell, 401 U.S. 66, 91 S. Ct. 764, 27 L.Ed. 2d 688 (1971) 10

State of Ohio, ex rel. Seney, Pros. Atty. v. Swift and Co., et al., 270 Fed. 141 (6th Cir. 1921), *cert. den.*, 257 U.S. 633 (1921), *appeal dismissed*, 260 U.S. 146 (1922) ... 11, 12, 13

State Tax Commission v. Union Carbide Corp., 386 F. Supp. 250 (D. Idaho 1974) 13

Trainor v. Hernandez, 431 U.S. 434, 97 S. Ct. 1911, 52 L.Ed. 2d 486 (1977) 10

Village of Wilsonville v. SCA Services, 86 Ill. 2d 1, 426 N.E.2d 824 (1981) 6

Younger v. Harris, 401 U.S. 37, 91 S. Ct. 746, 756, 760, 27 L.Ed. 2d 669 (1971) 10, 12, 13

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U.S. Sup. Ct. Rule 17.1, 28 U.S.C.A. 4

Miscellaneous

Cleveland and Rees, "Characterization of Plutonium in Maxey Flats Radioactive Trench Leachates", SCIENCE, vol. 212, pp. 1506-1509 (6-26-81) 5

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No. 81-900

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A.D., 1981

NUCLEAR ENGINEERING COMPANY, INC.,

Petitioner,

v.

TYRONE C. FAHNER, Individually and as Attorney General of Illinois,

Respondent.

and

PEOPLE OF THE STATE OF ILLINOIS, ex rel. TYRONE C. FAHNER, Attorney General of Illinois,

Respondent,

v.

NUCLEAR ENGINEERING COMPANY, INC., a California corporation,

Petitioner.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

IV. STATEMENT OF THE CASE

On April 22, 1980, at a press conference on the occasion of the tenth anniversary of "Earth Day," William J. Scott, then the Attorney General of Illinois, announced his intention to file lawsuits against several persons or companies believed to be violating Illinois environmental laws. Among those persons was the Petitioner, Nuclear Engineering Company ("NECO"), which operated a hazardous waste storage facility in Sheffield,

Bureau County, Illinois, which site the Attorney General believed was unsuitable for the purposes for which it had been selected.

On May 8, 1980, before such lawsuit was filed, NECO filed a Complaint for Injunctive and Declaratory Judgment relief in United States District Court for the Central District of Illinois, alleging that the Attorney General, although endowed with statutory powers to abate environmental pollution, would be acting unconstitutionally and beyond the powers of his office should he seek to bring a civil action against NECO alleging nuisance *per se* in the maintenance of its hazardous waste disposal site at Sheffield. Jurisdiction was sought under federal question and diversity of citizenship bases.

Twelve days later, on May 20, 1980, the State of Illinois, acting through the Attorney General, filed its Complaint in the state Circuit Court of Bureau County, against Teledyne Industries, Inc.[1] and Nuclear Engineering Company alleging that the Defendants were in violation of the Illinois Environmental Protection Act, *Ill. Rev. Stat.* 1979, ch. 111½, §§ 1001 *et seq.*, of regulations promulgated thereunder, and of a second Illinois statute, "An Act in Relation to the Prevention and Abatement of Air, Land and Water Pollution," *Ill. Rev. Stat.* 1979, ch. 14, §§ 11-12. The Complaint further charged Defendants were maintaining a common law nuisance. All these violations arose out of the operation of the hazardous waste disposal site at Sheffield. No allegations were made in this Complaint that hazardous waste disposal sites constituted a nuisance *per se;* the Complaint focused rather on the specific deficiencies of the Sheffield site. At the same time the Attorney General's action was filed, the State moved to dismiss NECO's federal court suit.

On May 28, 1980, NECO petitioned the Federal District

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1. As Petitioner has indicated (*Petition*, p. ii, note), Teledyne Industries, Inc. was dismissed as a party by the district court and is not a party to this proceeding.

Court to remove the State Court proceeding. On May 29, 1980, the Attorney General moved for remandment. The District Court, that same day, denied the Attorney General's Motion for Remandment and denied the State's Motion to Dismiss the NECO action. After additional preliminary proceedings, the District Court on July 3, 1980 agreed to certify the federal question and diversity of citizenship jurisdictional grounds in both complaints as controlling questions of law for the purposes of an interlocutory appeal. On August 14, 1980, the Seventh Circuit Court of Appeals granted the appeal sought. Following briefs and oral argument, the Court of Appeals issued its decision on August 26, 1981, of which NECO now seeks review by this Court.

V. ARGUMENT

A. Summary

These consolidated lawsuits arise out of a straightforward effort by the Illinois Attorney General to enforce state environmental laws and to abate a common law nuisance. The fundamental question placed before the Seventh Circuit was whether states have the right to enforce their environmental statutes and to seek abatement of common law nuisances in state court or whether such suits must be heard in federal court. The Court of Appeals correctly determined, in accordance with the decisions of this and other courts, that the State of Illinois is entitled to seek enforcement of its own law in its own courts. Because the lower court's decision does not involve any of the factors to be considered by this Court under its Rule 17.1, Respondents respectfully request this Court deny the Petition for Writ of Certiorari.

B. Factual Argument

1. The Attorney General's Suit Is a Straightforward State Law Enforcement Action; There Is No Evidence of Any Intent by the Attorney General to Attempt Closure of All Hazardous Waste Sites on a *Per Se* Nuisance Theory.

NECO impresses on this Court the argument that the Attorney General of Illinois is engaged in an unlawful campaign to bar the landfilling of any hazardous wastes in Illinois. Yet the only evidence offered by NECO in its Petition in support of this assertion is a carefully-edited portion of the remarks made by the Attorney General in the April 22, 1980 press conference mentioned above. An examination of the *entire* transcript of those remarks reveals, however, that even this purported piece of evidence does not substantiate NECO's assertion. A copy of that transcript (and the accompanying press release) is included as Appendix 1 to this Brief, pp. 1-A through 8-A. At that press conference, Attorney General Scott first stated:

> "[w]e realize that there have to be places in our State and in our nation where these deadly chemicals are disposed

> of. But unfortunately, the job isn't being done properly in the selection of those sites. The geological survey that just came out recently showed that Sheffield's setup was not the proper one. That the nuclear wastes that are there[2] are migrating 20 to 25 times as fast as anybody thought that they would. And that the dangers of the interaction between the chemical storage dump and the nuclear waste dump are very real indeed.[3] And so for that reason, we are filing suit against [NECO]. . . ."

Later on in the press conference, Attorney General Scott was asked, "[g]iven the population density of this State, is there any place where you feel it would be safe to store these things [radioactive wastes and dangerous chemicals]?" The Attorney General's reply was "[w]ell, there may well be, but the places that they have got it now just don't make any sense. . . ."

Only after these remarks were made did the Attorney General indicate that, were he to decide such matters, he would store toxic wastes in a desert or a remote place. He was further asked if there were any such remote place in Illinois. Not surprisingly, he replied that he could not think of any. Selection of an appropriate site for hazardous wastes involves an investigation of a number of scientific matters, including the physical, topographic, hydrogeologic and soil characteristics of a particular site. Any other answer to this general question, without such investigation, would have been irresponsible.

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2. A low-level radiation waste site which had been operated by NECO is located a matter of feet from the chemical waste site which is the subject of this action. That radiation waste site is no longer accepting wastes, although litigation concerning its present status is pending before the Federal Nuclear Regulatory Commission (No. 27-39) and before the Circuit Court of Bureau County, Illinois (78-MR-25).

3. The Attorney General's concern on this point is not without foundation. See, for example, Cleveland and Rees, "Characterization of Plutonium in Maxey Flats Radioactive Trench Leachates", *SCIENCE*, vol. 212, pp. 1506-1509 (6-26-81). The authors conclude ". . . it is highly inadvisable to locate a chemical waste disposal site adjacent to a radioactive waste disposal site." (pp. 1509.)

The specific allegations of the Attorney General's Complaint are entirely consistent with his press conference statements. Nothing contained or even implied in that Complaint reflects a policy on the part of the Attorney General to close or prohibit all hazardous waste disposal sites in Illinois. Rather, the Complaint treats the specific site deficiencies of the Sheffield facility, alleging that Petitioner, in its operation of that facility, is violating state statutory and common law. Further, no mention is made of federal law; with the exception of some minor coordinating language contained in the Illinois Environmental Protection Act, none of the state statutes in question could arguably be called "federal law".

NECO asserts its Sheffield site is "the one remaining fully-licensed hazardous waste burial site in Illinois"[4] (*Petition*, p. 4) and implies that the Attorney General's suit, following his successful suit against "the only other fully-licensed toxic waste burial site which existed in Illinois"[5], embodies a policy of seeking to ban all hazardous waste sites in Illinois. Putting aside the fact that a court, not the Attorney General acting alone, decided the prior case, finding that other site to be a common-law nuisance, and entered the orders condemned by NECO (*Petition*, p. 7), NECO's argument suggests that it should have some sort of immunity from suit in Illinois courts for violation of Illinois environmental law simply because it is the purported last remaining hazardous waste site in the state. Nothing in the Federal Constitution or federal law contemplates such an anomalous result.

Simply put, the Attorney General's Complaint, apparent on

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4. There are other landfills in Illinois which have or receive periodically permits from the Illinois Environmental Protection Agency to receive hazardous wastes and which hold interim RCRA permits (see the discussion of such interim permits below, pp. 7-8; however, these sites do not receive a full spectrum of hazardous wastes, as does NECO's Sheffield site.

5. *Village of Wilsonville v. SCA Services*, 86 Ill. 2d 1, 426 N.E.2d 824 (1981).

its face and in light of the surrounding circumstances, is an unremarkable effort to enforce state law in state court, only one of many thousands filed by state and local officers each year in Illinois. NECO offers, and can offer, no reason to force Illinois to pursue such matters in federal court only.

2. The Federal "License" Held by Petitioner Was Obtained Virtually Automatically Without Significant Demonstration of the Adequacy of Its Sheffield Site and, in any Case, Was Issued as a Direct Result of an Illinois State Permit Which the Attorney General Seeks to Challenge in Illinois State Courts.

In at least six places in its Petition, NECO makes reference to a "federal license" issued to it by the United States Environmental Protection Agency [hereinafter "USEPA"], pursuant to the Resource Recovery and Conservation Act [hereinafter "RCRA"], 42 U.S.C.A. §§6901 *et seq*. NECO apparently seeks to persuade this Court that it has gone through a exhaustive and thorough evaluation of its site by federal experts in the field of hazardous waste storage, passed with flying colors, and been issued an operating license for the site which the Attorney General now seeks to have invalidated.

The reality is quite different. Although Congress intended that a rigorous review of *all* hazardous waste facilities be made by USEPA, it recognized the hard fact that no such review could be performed immediately upon enactment of RCRA (in October of 1976), given the large number of existing hazardous waste sites and the limited resources of USEPA. Congress chose to establish, under Section 3005(e) of RCRA, as amended, an interim permit program. This provision may be seen in *Appendix*, p. 14-A.

Under Section 3005(e) of RCRA, and the related regulations, 40 C.F.R. Part 122, any operator of a hazardous waste site in existence on or before November 19, 1980 (which includes NECO's Sheffield site) which sought a federal RCRA license

had only to (a) submit to USEPA a timely "Part A" application (40 C.F.R. § 122.24) giving only general information about the site, the wastes located there and the processes used to treat, store or dispose of such wastes, and (b) notify USEPA, under Section 3010 of RCRA (in *Appendix*, p. 15-A), of all hazardous wastes (once identified as such in USEPA regulations) handled at the site and the activities undertaken with such wastes. NECO holds such an interim permit for Sheffield.

Although Congress intended that a comprehensive set of operating standards for hazardous waste facilities be promulgated by USEPA (see Section 3004 of RCRA in *Appendix*, p. 11-A), no such final standards have been proposed. See *Illinois v. Gorsuch*, D.C.D.C., Nos. 78-1689, 78-1715, 78-1734 and 78-1799, Order of Judge Gesell, 11-13-81, as reported in 12 *Environmental Reporter* 891 (11-20-81). Because these standards are not available, USEPA cannot under Section 3005 of RCRA presently act on a RCRA permit application from a "new" hazardous waste site (*i.e.*, one coming into existence after November 19, 1980) nor make final administrative disposition of permanent RCRA permit applications from existing sites. Until such time as (a) the final Section 3004 performance standards are in effect, (b) NECO is asked by USEPA to submit a "Part B" application (under 40 C.F.R. §122.25) for a permanent RCRA license, and (c) such application is acted on, NECO will continue to qualify under Section 3005 for an interim license.

In short, NECO holds its highly-touted federal license for Sheffield almost entirely as a consequence of the site's being in existence on November 19, 1980. This status in turn was due to the fact that the Illinois Environmental Protection Agency had issued for NECO's Sheffield landfill site, beginning in 1974, a series of two-year "experimental" permits.[6] However, under Section 21(d) of the Illinois Environmental Protection

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6. NECO received in 1981 an "operating" permit; the previous three permits (1974, 1976 and 1978) were all "experimental".

Act, *Ill. Rev. Stat.* 1979, ch. 111½, §1021(d), such permits are to be issued "upon such conditions . . . as may be necessary to assure compliance with [the Illinois Environmental Protection Act] and with regulations adopted thereunder. . . ." Section 21(d) of this Act is set out in the Appendix to this Brief, p. 17-A. The Complaint filed by the Attorney General in Illinois State court asserts, in Counts I and II, that NECO has violated that Act in its operation of the Sheffield facility. The Court will note the irony in NECO's argument that its "federal license", held as a direct consequence of a previously issued state permit, ought to forestall a determination of the legality of that state permit in that state's own courts.

C. Argument On The Law

1. The Decision of the Seventh Circuit in This Case, to the Extent It Incorporates the Holding and Reasoning of *Wycoff*, Neither Presents an Important Question of Federal Law Nor Conflicts with Decisions of Other Circuit Courts of This Court, and Is, in any Event, Justified on *Younger v. Harris* Grounds.

NECO misconstrues the nature of the Seventh Circuit's use of *Public Service Commission of Utah v. Wycoff*, 344 U.S. 237 (1952). The Seventh Circuit held in the instant case that the NECO federal court declaratory judgment and injunction suit against the Attorney General could not be maintained because, when filed, there was no "case or controversy" before the federal court, citing (among other cases) *Wycoff*. Having held the NECO suit should therefore have been dismissed by the federal court, the Circuit Court went on to discuss how the federal district court should treat any attempt to refile the NECO action. (*Opinion*, pp. 21-23.) As part of *that* discussion, clearly in the nature of *dictum*, the Court stated that *Wycoff* and other cases would require, when a federal declaratory plaintiff seeks to establish a federal claim that is essentially a defense to a threatened or pending state coercive action, that

the character of that threatened or pending action determines whether federal jurisdiction exists over the declaratory suit.

NECO argues that the Seventh Circuit's *Wycoff* discussion conflicts with the Fifth Circuit (see *Braniff International, Inc. v. Florida Public Service Commission*, 1978, 576 F.2d 1100) and the Ninth Circuit (*Rath Packing Co. v. Becker*, 1975, 530 F.2d 1295, *aff'd sub nom., Jones v. Rath Packing Co.*, 1977, 430 U.S. 519). This argument might be of some academic interest, given the different facts of the various Circuit Courts of Appeal cases on point.[7] But the instant case presents no reasons why this Court need deal with this purported conflict now. As discussed above, the Seventh Circuit's discussion of *Wycoff* that NECO criticizes is patently *dictum* and formed no part of its holding that the NECO suit ought to be dismissed.

In addition, quite apart from any *Wycoff* hurdle it may face, the NECO suit is barred on *Younger v. Harris* grounds. In *Younger v. Harris*, 401 U.S. 37 (1971), and succeeding cases, this Court has prevented federal court interference, in either injunctive[8] or declaratory judgment[9] actions, with state court criminal proceedings[10] or civil actions in which the state has an interest,[11] whether the state court proceeding is pending or filed before anything of substance occurs in the federal court.[12] The Attorney General's suit is without question an action in which the State of Illinois has considerable interest and was

7. To the Ninth Circuit and Fifth Circuit cases cited above, compare *Milprint, Inc. v. Curwood, Inc.*, 562 F.2d 418 (7th Cir. 1977); *Allegheny Airlines, Inc. v. Penna. P.U.C.*, 465 F.2d 237 (3rd Cir. 1972); *McCorkle v. First Pennsylvania Banking and Trust Co.*, 459 F.2d 243 (4th Cir. 1972); *Monks v. Hetherington*, 573 F.2d 1164 (10th Cir. 1978); and *Chandler v. O'Bryan*, 445 F.2d 1045 (10th Cir. 1971).

8. *Younger v. Harris*, 401 U.S. 37 (1971).

9. *Samuels v. Mackell*, 401 U.S. 66 (1971).

10. *Younger* and *Samuels, supra.*

11. *Trainor v. Hernandez*, 431 U.S. 434 (1977).

12. *Hicks v. Miranda*, 422 U.S. 332 (1975); and *Moore v. Sims*, 99 S.Ct. 2371 (1979).

filed before any substantive decisions were made in the NECO federal court action.[13] "[T]he only pertinent inquiry is whether the state proceedings afford an adequate opportunity to raise the constitutional claims." *Moore v. Sims*, 99 S.Ct. 2371, 2381 (1979). NECO makes no claim, nor could it, that Illinois courts will not give proper consideration to any defense, federal or otherwise, to the Attorney General's court suit.

In sum, the Seventh Circuit's decision involves no important question of federal law nor any conflict with other circuits and, in any event, is fully supportable on alternative grounds.

2. The Seventh Circuit's Holding that Diversity Jurisdiction Is Unavailable to Allow Removal of the Attorney General's Suit Is Correct; the Purported Conflict with Other Circuits Is Insufficient to Warrant This Court Granting *Certiorari*.

NECO argues the Attorney General's state court action is removable to federal court on the grounds of diversity of citizenship, asserting that, since the Attorney General was acting unconstitutionally in bringing the state court proceeding, he acted as an individual for diversity purposes. This argument relies almost entirely on the Sixth Circuit's decision in *State of Ohio, ex rel. Seney, Pros. Atty. v. Swift and Co., et al.*, 270 Fed. 141, *cert. den.*, 257 U.S. 633 (1921), *appeal dismissed*, 260 U.S. 146 (1922). *Seney* involved a state prosecution against an out-of-state defendant removed to federal district court. On appeal, defendant argued removal was justified on (among other grounds) diversity of citizenship. The Sixth Circuit agreed that there was diversity of citizenship between the state prosecutor individually and the out-of-state defendant, hence removal of the state prosecution to federal court was proper. The court noted the defendant's "good faith" assertion that the state laws

13. Of course, *Younger* would bar any attempt by NECO to refile its federal court complaint, rendering harmless any purported error in the Seventh Circuit's *dictum* on *Wycoff*.

which the prosecutor was enforcing were unconstitutional. Analogizing to *Ex parte Young*, 209 U.S. 123 (1908), the court reasoned the prosecutor lacked state authority to enforce the challenged laws and thus he, rather than the State, became the plaintiff.

The Sixth Circuit's analogy to *Ex parte Young* was inapt, as the Seventh Circuit observed in this case (*Opinion*, p. 16). *Ex parte Young* created, as Wright (*Federal Practice and Procedure*, §4231) has noted, a legal *fiction* that:

> "... enforcement of the Minnesota statute is state action for the purposes of the Fourteenth Amendment but merely the individual wrong of Edward T. Young for purposes of the Eleventh Amendment." (pp. 356-357)

The Court created this fiction to provide the corporate parties in that case their only practical chance to test the constitutionality of the statute without having to violate it.

The impact of *Ex parte Young* on state enforcement actions has been severely limited by decisions like *Younger v. Harris*, 401 U.S. 37 (1971), and succeeding cases. Even accepting *Ex parte Young* at face value, however, there was no justification in *Seney* for extending the principle of that case to diversity jurisdiction. The *raison d'etre* of the *Ex parte Young* fiction did not apply in *Seney;* the *Seney* defendant, like NECO here, had allegedly violated state law, had been sued, and could press its constitutional claims in its defense of that action, without the additional cost or risk that the *Ex parte Young* plaintiff faced.

Seney, moreover, created bad law. *Seney* would permit all out-of-state defendants to remove state prosecutions to federal court, for all such defendants can claim their conduct is constitutionally protected from such prosecution and thereby obtain federal diversity jurisdiction with purely defensive allegations.

Despite the novelty of the Sixth Circuit's extension of *Ex parte Young* and the sixty-one years since its announcement, no other court in the United States has ever used *Seney* to support

a similar holding. The only other case arguably reaching a similar result, *Mouton v. Sinclair Oil and Gas Co.*, 410 F.2d 717 (5th Cir. 1969) *cert. den.*, 398 U.S. 957 (1970), failed to mention *Seney* and involved virtually no discussion of the diversity issue. As the Seventh Circuit noted in its discussion of this case (*Opinion*, pp. 16-17), those courts that have discussed *Seney* have uniformly criticized and rejected its holding.[14] Even the Eastern District of Michigan, part of the Sixth Circuit, felt constrained to limit *Seney* to its "precise facts and circumstances" in *Olson v. Doerfler*, 225 F. Supp. 540 (1963).

It is clear that any conflict between the Seventh Circuit's decision in this case and *Seney* is more apparent than real, given the age of *Seney* and the complete lack of persuasion it has exercised in other circuits. In any case, the Seventh Circuit's decision to reject NECO's diversity grounds as support for removal of the Attorney General's suit to federal court is, again, fully justified on *Younger v. Harris* grounds. If the principles of "Our Federalism" as exemplified in *Younger v. Harris* and succeeding cases prevent federal courts from hearing original federal actions seeking to interfere with state court proceedings, how much more will they prevent that same federal court from swallowing whole the state court case and ousting the state court of its power to hear the matter? Nothing the Seventh Circuit has done in its decision regarding diversity warrants this Court hearing this case.

3. The Seventh Circuit Did Not Depart from Accepted Principles Settled by This Court in Its Determination that No Case or Controversy Existed to Justify Federal Question Jurisdiction over the NECO Suit.

The Seventh Circuit held that, at the time the NECO federal

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14. *Eure v. NVF Co.*, 481 F.Supp. 639 (E.D.N.C. 1979); *National Market Reports, Inc. v. Brown*, 443 F.Supp. 1301 (S.D.W. Va. 1978); *State Tax Commission v. Union Carbide Corp.*, 386 F.Supp. 250 (D. Idaho 1974); *Commonwealth v. Norman*, 249 Mass. 123, 144 N.E. 66 (1924).

court action was filed, there was no "case or controversy" before the federal court, hence the suit should have been dismissed. The Court of Appeals mentioned two things it felt were relevant to this holding: (1) the absence of any evidence of injury to NECO's business caused by the Attorney General's announcement of his intent to sue, and (2) the fact that the nature of the relief sought by NECO (a declaration that its Sheffield operation was lawful and could be continued so long as NECO obeyed all pertinent valid federal, state and local law) would engage the district court in a "tautologous exercise". (*Opinion*, pp. 18-21)

NECO criticizes the first of these points on the grounds that the announced intention to sue for closure of the NECO site was the "ultimate in coercive action", hence to deny federal jurisdiction here, while allowing it for less "coercive actions", is illogical. (*Petition*, p. 17)

But NECO's criticism is itself illogical. The measure of "immediate coercive consequences", for federal court case or controversy purposes in this case, is the harm caused by the announcement of a forthcoming suit, *not* the relief sought in that as-yet unfiled suit. NECO protests that there is nothing else that NECO can do except file its federal action to prevent this announced "purpose to destroy", ignoring completely the fact that it can defend the State court action brought against it.

NECO complains that the second factor considered by the Circuit Court is misleading, that in reality that a federal suit was the only way NECO could save itself from "imminent destruction." (*Petition*, p. 9.). But once again NECO confuses the supposed harm caused it by the Attorney General's announcement (which is the stuff from which the case or controversy must arise here) with the relief he said he would ask from the state court.[15]

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15. The Court of Appeals noted that no evidence of harm had been pleaded by NECO in its federal action. *Opinion*, p. 19.

NECO argues the Seventh Circuit's decision on the case or controversy point "departs so far from the accepted principles settled by this court for determining the existence of a case or controversy. . . ." as to call for this Court to exercise its powers of supervision (*Petition*, p. 17). In support of this assertion, NECO cites two of this Court's decisions, both of which arose out of the over-ten-year-long dispute between the City of Chicago and Railroad Transfer Service, Inc. concerning the transportation of railroad passengers among the various rail stations in Chicago.[16] The cases are, however, distinguishable from the case at hand. The first case involved the City's threatening criminal prosecution against Railroad Transfer employees under the authority of an allegedly unconstitutional city ordinance, this Court holding that a suit against the ordinance could be heard in federal court.

The second suit was essentially a continuation of the first case. This Court held federal jurisdiction again was available, noting that the dispute between the parties has lasted more than ten years, that the City had made continual changes in the ordinance to regulate Railroad Transfer further and had continually demanded compliance with the ordinance without bringing any enforcement action.

Here, there are no unfulfilled threats of criminal prosecution, no long-standing dispute which the Attorney General is refusing to resolve by bringing an enforcement action. There are no allegations by NECO that the Federal Constitution or federal law preempts Illinois efforts to regulate its activities.

NECO fails to discuss in its Petition the more recent *Lake Carriers'*[17] decision of this Court, despite the Circuit Court's lengthy analysis in its Opinion. The absence of any mention of *Lake Carriers'* by NECO is not surprising, since the Seventh

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16. *Chicago v. Atchison, T. and S. F. R. Co.*, 357 U.S. 77 (1958) and *Railroad Transfer Service, Inc. v. Chicago*, 386 U.S. 351 (1967).

17. *Lake Carriers' Assn. v. MacMullan*, 406 U.S. 498, 92 S.Ct. 1749 (1972).

Circuit carefully and correctly construed *Lake Carriers'* to demonstrate the absence of a case or controversy in the instant matter. Unlike here, the state officials in *Lake Carriers'* were using the threat of a state enforcement suit to extract unwilling compliance with a State law allegedly violative of federal rights. This Court held that the absence of any pending enforcement action did not bar a federal court suit attacking the state law in question. "In this circumstance, compliance is coerced by the threat of enforcement, and the controversy is both real and immediate." *Ibid*, 92 S.Ct. at 1756. In the case presented now, the Attorney General had used no threat to obtain compliance with state law; indeed, the nature of the relief he said he intended to seek (an order closing the site and directing removal of all the wastes buried there) made compliance impossible.

The Seventh Circuit's "case or controversy" holding was both correct and entirely consistent with this Court's decisions on point; there is no need for this Court to exercise its powers of supervision in this matter.

4. The Seventh Circuit's Handling of This Case Poses No Important Federal RCRA Preemption Questions Which Have Not Been, But Should Be, Decided by This Court.

It is clear that Congress, in enacting RCRA, did *not* intend to preempt state laws regulating hazardous waste sites. NECO admits that, in its Petition (p. 18), as it must in the face of the unmistakable language of Section 3009 of RCRA and the holding of this Court in *Philadelphia v. New Jersey*, 437 U.S. 617 (1978). NECO says, however, that RCRA does preempt any state efforts to withdraw itself entirely from the national waste disposal system set up by Congress through RCRA *(Petition*, pp. 18-19) and asserts the Seventh Circuit's brief treatment of this matter warrants this Court reviewing the Circuit Court's holding. Section 3009 of RCRA may be seen in the Appendix, pg. 14-A.

Preliminarily, it should be noted that the Seventh Circuit

merely summarized, in its footnote 10 on page 13a to which NECO makes reference, the language of Section 3009. The discussion in footnote 10 plays little part in the Court of Appeal's holding that the Attorney General's state court suit arose solely under state law and could not be removed to federal court under federal question jurisdictional grounds. In light of cases like *Gully v. First National Bank in Meridian*, 299 U.S. 109 (1936), there is no doubt the Seventh Circuit ruled correctly on this point.

It should be further noted that the Circuit Court held there was no federal court jurisdiction to hear the NECO suit because of the absence of a case or controversy and *not* because NECO's RCRA preemption arguments were without merit.

In short, NECO's preemption arguments in its Petition are made in a vacuum, since the preemption question played no part in the Seventh Circuit's decision.

Even if we ignore this fatal flaw, NECO's assertions nonetheless fail to state an important federal question, for NECO offers no evidence to demonstrate Illinois' imagined effort to opt out of the RCRA hazardous waste disposal system. The Complaint filed by the Attorney General offers NECO no aid, since it deals with the specific deficiencies of the Sheffield site. The Attorney General's press conference remarks, as we have seen (Statement of Facts, *supra*, p. 4), also provides no help. Even if the Attorney General proves his case against NECO and succeeds in having the court order the Sheffield site closed, nothing in that decision will prevent NECO or anyone else from seeking to establish a hazardous waste site elsewhere in Illinois.

That the Attorney General's suit is, in any case, not barred by RCRA is perhaps best exemplified by the decision rendered by this Court in *Philadelphia v. New Jersey*. That case held that a New Jersey statute which barred the importation of virtually all out-of-state solid and liquid wastes into the state, thus effec-

tively closing its borders to all such wastes, did *not* conflict with RCRA. Even accepting, *arguendo*, NECO's assertion that the Attorney General is surreptitiously seeking to prevent any hazardous waste burial in Illinois, it is difficult to see why RCRA *alone* would preempt such efforts when it did not preempt the New Jersey law discussed above.

Since the question of RCRA preemption was irrelevant to the Seventh Circuit's decision and since that question has largely been resolved in *Philadelphia v. New Jersey*, NECO's request that this Court grant *certiorari* to review the question of RCRA preemption is unfounded and should be rejected.

VI. CONCLUSION

The Seventh Circuit rightly decided this case. In so doing, it followed the law as set forth in the decisions of this Court and in no way deviated from the accepted and usual course of judicial proceedings. Further, it did so without creating appreciable conflict with the decisions of other Circuits. Finally, its decision raised no important issue of federal law which has not been, but should be, settled by this Court. For these reasons, Respondents respectfully request this Court deny the Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

TYRONE C. FAHNER and PEOPLE OF THE STATE OF ILLINOIS

BY:_____

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APPENDICES

APPENDIX 1

Press release regarding forthcoming environmental protection actions to be filed by the Attorney General:

FOR IMMEDIATE RELEASE—FOR FURTHER INFORMATION, Contact Frank Grenard: (312) 793-3117

Chicago, Illinois, April 22, 1980—Attorney General William J. Scott announced today that his office will launch a major new offensive against the dangerous and illegal handling of deadly chemical and nuclear waste.

On the tenth anniversary of Earth Day, Scott said suits will be filed soon against three major industrial polluters to insure that Illinois will not be allowed to become the nuclear and chemical garbage dump of the nation.

"Ten years ago," Scott said, "I announced my commitment and directed my efforts to rescuing and preserving Lake Michigan. That fight is still underway but we have made significant progress. Today, we have an even greater challenge—to stop the accumulation and dumping of deadly waste in Illinois."

Scott said his office will shortly file suit against the toxic chemical dump operated by the Nuclear Engineering Company, a subsidiary of the California-based conglomerate Teledyne Corporation. "While we were engaged in our successful battle to close down the radioactive waste dump operated by NECO at Sheffield, we found that the company also operated a chemical site immediately adjacent to the radioactive waste facility. It was appalling that either site was located at Sheffield. The siting is geologically improper. There is a danger of the chemical and nuclear waste interacting. The chemical waste dump contains a virtual shopping list of deadly materials which imperil the food and water supplies in that area," Scott said.

"Our next suit will be filed by the end of this month." Scott announced, "and it will name the Kerr-McGee Corporation as

the defendant for the placing of radioactive thorium at various locations in Chicago's Western suburbs, primarily in West Chicago." Scott explained that the thorium was used in making mantles for gas lamps and the residue was dumped in dozens of locations in and near West Chicago. "This deadly waste cannot be allowed to remain in its present state—uncontrolled and unmanaged. Kerr-McGee owns the property. Kerr-McGee has the responsibility for cleaning up its waste product and removing it to a safe area. That responsibility is not the taxpayers and we want to make sure that the cost falls on the proper party—Kerr-McGee," Scott said.

The third action will involve the bringing of criminal charges against the Modern Plating Company in Freeport, Illinois, accusing the company and certain individual officers with discharging cyanide, arsenic and heavy metal compounds into the Pecatonica River. "In addition, the company and some officers have failed to comply with Illinois Pollution Control Board orders and have filed false reports with the State about their activities, trying to cover up their actions," Scott said. Scott noted that there will be several hundred criminal counts filed against the defendants.

"There seems to be an alarming trend," Scott said, "a trend of deadly wastes being dumped in one of the most populous areas of the United States. We have developed tools to prevent that trend from continuing. We have learned lessons in our battle to save Lake Michigan and to close down some of the improper dump sites in Illinois such as the chemical site at Wilsonville. We are ready to put that background to use in these and other cases which involve these deadly materials."

On Earth Day, April 22, 1970, Scott announced that the battle to protect Lake Michigan was underway. Since that date, Scott has succeeded in obtaining court orders requiring all steel companies in Southeastern Illinois and Northwestern Indiana to totally recycle waste water discharges; forcing the City of

Milwaukee to stop dumping raw sewage into the waters of the Lake; and establishing the right of the Attorney General to sue out-of-state polluters whose activities have an effect on Illinois waters.

"The 1970's saw substantial progress in protecting our precious environmental heritage for our children and their children and for the generations to come," Scott said, "but the battle is far from over. Today's problems must be solved today, not left for the future. The dumping of chemical and radioactive waste must be addressed now. These suits will reflect our determination that powerful vested interests will not be allowed to destroy our environment."

Tonight, Scott will receive the Illinois Environmental Council's David Dinsmore Comey Award for public service to recognize him for his efforts to protect the environment in Illinois.

EXHIBIT 1

Transcript of 4-22-80 press conference:

Ten years ago today, hundreds of thousands of people around this nation gathered for Earth Day and helped turn the direction of this country into a concern about the environment. And during those ten years we've made tremendous strides, protecting not only our air and water, but the health and lives of the citizens in our country and around the world. The challenges that are still facing us are tremendous. They can determine what type of a world we are going to be living in. And so it is important, ten years after Earth Day, to remember that the fight has not been won, and that the dangers facing us are even greater than they were ten years ago. Despite the fact that we have been able to literally save Lake Michigan and turn the direction around, all the steel companies and the greatest steel making complex in the world are now under court orders to totally recycle. And despite the fact that the sulphur dioxide count is down and that the air in Chicago is cleaner as far as sulphur dioxide is concerned. We've got challenges that are going to require constant effort on the part, not only of the Attorney General's Office, but of industry and government, and citizens alike.

The greatest challenges that we are facing in the 1980's are the challenges of the deadly chemical and nuclear wastes that have been generated in the last 25 and 30 years. Unfortunately, Illinois has become a dumping ground for much of these sophisticated toxic wastes, and we are leaving a heritage for our children and their children, that can truly be frightening.

Today we are announcing a new program, to concentrate the efforts of the Attorney General's Environmental Division in dealing with these challenges of deadly chemical and nuclear wastes. I've instructed our Environmental team to put together three important law suits, which can help emphasize the fact that we are not going to tolerate these incredibly dangerous chemicals being handled in haphazard manners throughout our State.

One of the greatest concerns, of course, that we've had have been the facilities that are being utilized to bury the deadly wastes underground. Not enough emphasis has been placed on detoxifying, recycling and reusing the deadly chemical wastes and the nuclear wastes. Instead they've been buried a few feet underground like they were at Love Canal in New York and left as a legacy for birth defects and brain damage and deaths caused to cancer and other causes of these deadly chemicals. We saw that happen down in Wilsonville, Illinois, and we went to court and just last week, won a final decision from the Illinois Supreme Court that allowed us to shut down Wilsonville and to protect the citizens of that community. Using those tools we're now going to deal with a very serious problem in Northern Illinois in Sheffield where they have a combination of both a nuclear waste dump and a chemical waste dump that is virtually a shopping list of some of the deadliest contaminants ever known to mankind. We realize that there have to be places in our State and in our nation where these deadly chemicals are disposed of. But unfortunately, the job isn't being done properly in the selection of those sites. The geological survey that just came out recently showed that Sheffield's setup was not the proper one. That the nuclear wastes that are there were migrating 20 to 25 times as fast as anybody thought that they would. And that the dangers of the interaction between the chemical storage dump and the nuclear waste dump are very real indeed. So for that reason, we are filing suit against the Nuclear Engineering Company, which is a subsidiary of Teledyne, the California conglomerate and requiring them to cease the operation of their dumping of deadly chemicals in Northern Illinois, just as we have been fighting the dumping of the deadly nuclear waste at their adjoining dump at that same location at Sheffield.

We're also filing suit against the Kerr-McGee Corporation, a corporation that engaged in the processing of rare earth and thorium in West Chicago, Illinois and left sitting at that location

literally thousands of cubic feet of contaminated soil. Radioactive material is in there as well as chemical material and even though the Nuclear Regulatory Commission has taken the attitude that they have pre-empted the protection of radioactive materials of this nation, it still sits there without any plan or any programming for the eventual safeguarding of the people in that community. And so again we are going into court in the DuPage County Circuit Court and asking that under the environmental laws of Illinois that they be forced not only to properly dispose of that dangerous material, but that the company be fined over a million dollars for their negligence.

And the third case involves the dumping of deadly cyanide and arsenic wastes and heavy metals into the Pecatonica River in Freeport, by the Modern Plating Company there, who not only put these deadly chemicals into the water supply, but who then falsified the records to indicate that they have been in compliance with the Illinois Pollution Control Board Order. In this case, the violation is so flagrant and so willful in the wrongdoing, so deliberately, that I have instructed our Environmental Division to work with our Criminal Division to obtain criminal charges against not only the company but against the president, the vice-president and the treasurer of the company. I think that it's absolutely essential that we realize that when we are talking about people's health and their lives and the deliberate contamination of the water and food supply, that those are crimes, crimes not only against the people of that community, but crimes against nature. And so we are going to proceed with a criminal action, which is one of the few times in the history of this State that we have felt the necessity to use our criminal powers that we developed under the Environmental Protection Act as well as the civil powers of our Office.

I think that the most appropriate way for us to celebrate Earth Day, ten years later, is to show that this Office is standing by its commitment to protect the health and welfare of the people of our State and the future generations.

QUESTION: How many more cases do you think could come out of this drive against the chemical nuclear wastes?

ANSWER: I think that there will be several others, although the majority of the cases dealing with nuclear waste are already filed by our Office. We are involved of course with the storage facilities at Zion, at Cordova, at Dresden, at Morris. We've already been involved in the nuclear waste disposal facility at Sheffield. We've shut down the chemical dump at Wilsonville. And we are very much concerned about the need to deal with illegal dumping. And yesterday I met with the assistant administrator of the Federal EPA asking them to coordinate with our Office in an effort to go after the people that are literally pouring these deadly chemicals down the sewers and into the streams and rivers of our nation illegally. And I think that this is one of the really frightening dangers, that about 80 percent of the deadly wastes do not end up in the normal processing procedure. They just somehow disappear. And the new regulations that will be coming out in August from the Federal EPA will give us the ability for the first time to track down these deadly chemicals and other toxic wastes from the time that they are created. But in order to monitor that, we are going to need the cooperation of the Federal EPA as well as our own Office.

QUESTION: You said you understand the need to store dangerous chemicals and radioactive wastes. Given the population density of this State, is there any place where you feel it would be safe to store these things?

ANSWER: Well there may well be, but the places that they have got it now just don't make any sense, to store them alongside Lake Michigan at Zion or alongside the Illinois River at Dresden, or at Cordova alongside the Mississippi are just incredibly poor places to store it. Again in talking with the Federal EPA people yesterday, I emphasize the fact that we not only feel that there is a need to recycle and detoxify, but that if

they are going to bury or store deadly wastes, that it should be done in the desert. The people that own Sheffield, for example, own a toxic waste dump in Nevada where they have virtually no rainfall. And the big problem at Sheffield is that there is a tremendous amount of water that flows over those chemicals. And the migration of it is much faster because of the fact that it is right in the watershed. And of course, the problem that we have got is that that water shed flows into the Illinois River. Our food supplies for the nation are right there. If you go out to Sheffield, you will see that cows are grazing a few feet away, that corn is growing there and that is the food that seven million people of this metropolitan area are eating.

QUESTION: Where would you store toxic wastes?

ANSWER: I would store it in a desert, in one of the remote places of the nation, hopefully under Federal guard where there are not water supplies, food supplies, and most important of all people.

QUESTION: Is there any remote place in Illinois?

ANSWER: Well I cannot think of any place in the State with twelve million people that is a good spot to store the deadliest contaminant known to mankind. And I think that it's reasonable to say that this is a national problem and not a problem of Illinois. We sell our electricity all over the nation, and I do not see why we have to be the dumping ground for the nation for the nuclear wastes.

QUESTION: What is the name of the president and the vice-president and treasurer of the Modern Plating Company?

ANSWER: I brought George Wolff along because I knew that Dolores would have some questions that I could not answer. So George has the names of them, I think. Anyhow, its the president, the vice-president in charge of their sewage treatment and the treasurer of the company.

EXHIBIT 3

STATE OF ILLINOIS }
COUNTY OF COOK } ss.

AFFIDAVIT

FRANK M. GRENARD, being first sworn on oath, states as follows:

1. I am Frank M. Grenard and I have personal knowledge of the facts set forth herein.

2. I am an Assistant Attorney General and Executive Assistant to the Attorney General of Illinois and, as part of my responsibility, I coordinate the news media relations of the Office of the Attorney General.

3. On April 22, 1980, as part of his official responsibility, Attorney General William J. Scott conducted a news conference in Chicago, Illinois, to outline what actions the Attorney General's Office planned to take with respect to the disposal of chemical and/or nuclear waste materials.

4. A News Release was prepared prior to the news conference, outlining the purposes of the news conference and a true and correct copy of that news release is attached hereto. (Exhibit 1)

5. The News Release prepared and issued on April 22, 1980, did not state that the Nuclear Engineering Company was "illegally" operating a chemical dump.

6. A tape recording was made of the April 22, 1980 news conference by myself using a functioning and operating tape recording machine which recorded during the entire news conference. A copy of the tape recording is attached. (Exhibit 2)

7. A true and accurate transcript of the tape recording was prepared which contains all statements made by Attorney General William J. Scott with respect to the disposal of chemi-

cal and/or nuclear waste material. I have listened to the tape recording and read the transcript and the attached transcript is correct. (Exhibit 3)

8. I was personally present during the entire news conference of April 22, 1980 and Attorney General William J. Scott did not say that the activities of the Nuclear Engineering Company were illegal.

9. I was not contacted by the Nuclear Engineering Company, its officers, agents, employees and/or attorneys prior to the date of this affidavit and have not been asked, at any time, to provide any information to the Nuclear Engineering Company, its officers, agents, employees and/or attorneys with respect to news releases issued by the Attorney General's Office or statements made by Attorney General William J. Scott on April 22, 1980.

10. This affidavit consists of two pages, this being the second page.

FURTHER AFFIANT SAYETH NOT

/s/ FRANK M. GRENARD

Subscribed and Sworn to before me this
13th day of May, 1980.

/s/ Marian Wallenda, Notary Public

APPENDIX 2

Section 3004 of the Resource Conservation and Recovery Act, 42 U.S.C.A. § 6924:

§ 6924. Standards applicable to owners and operators of hazardous waste treatment, storage, and disposal facilities.

Not later than eighteen months after October 21, 1976, and after opportunity for public hearings and after consultation with appropriate Federal and State agencies, the Administrator shall promulgate regulations establishing such performance standards, applicable to owners and operators of facilities for the treatment, storage, or disposal of hazardous waste identified or listed under this subchapter, as may be necessary to protect human health and the environment. In establishing such standards the Administrator shall, where appropriate, distinguish in such standards between requirements appropriate for new facilities and for facilities in existence on the date of promulgation of such regulations. Such standards shall include, but need not be limited to, requirements respecting—

(1) maintaining records of all hazardous wastes identified or listed under this chapter which is treated, stored, or disposed of, as the case may be, and the manner in which such wastes were treated, stored, or disposed of;

(2) satisfactory reporting, monitoring, and inspection and compliance with the manifest system referred to in section 6922(5) of this title;

(3) treatment, storage, or disposal of all such waste received by the facility pursuant to such operating methods, techniques, and practices as may be satisfactory to the Administrator;

(4) the location, design, and construction of such hazardous waste treatment, disposal, or storage facilities;

(5) contingency plans for effective action to minimize un-

anticipated damage from any treatment, storage, or disposal of any such hazardous waste;

(6) the maintenance of operation of such facilities and requiring such additional qualifications as to ownership, continuity of operation, training for personnel, and financial responsibility as may be necessary or desirable; and

(7) compliance with the requirements of section 6925 of this title respecting permits for treatment, storage, or disposal.

No private entity shall be precluded by reason of criteria established under paragraph (6) from the ownership or operation of facilities providing hazardous waste treatment, storage, or disposal services where such entity can provide assurances of financial responsibility and continuity of operation consistent with the degree and duration of risks associated with the treatment, storage, or disposal of specified hazardous waste.

Pub.L. 89-272, Title II, § 3004, as added Pub.L. 94-580, § 2, Oct. 21, 1976, 90 Stat. 2807.

As amended Pub.L. 96-482, § 9, Oct. 21, 1980, 94 Stat. 2338.

Section 3005 of the Resource Conservation and Recovery Act, 42 U.S.C.A. § 6925:

§ 6925. Permits for treatment, storage, or disposal of hazardous waste.

(a) Permit requirements.—Not later than eighteen months after October 21, 1976, the Administrator shall promulgate regulations requiring each person owning or operating a facility for the treatment, storage, or disposal of hazardous waste identified or listed under this subchapter to have a permit issued pursuant to this section. Such regulations shall take effect on the date provided in section 6930 of this title and upon and after such date the treatment, storage, or disposal of any such hazardous waste is prohibited except in accordance with such a permit.

(b) Requirements of permit application.—Each application for a permit under this section shall contain such information as may be required under regulations promulgated by the Administrator, including information respecting—

(1) estimates with respect to the composition, quantities, and concentrations of any hazardous waste identified or listed under this subchapter, or combinations of any such hazardous waste and any other solid waste, proposed to be disposed of, treated, transported, or stored, and the time, frequency, or rate of which such waste is proposed to be disposed of, treated, transported, or stored; and

(2) the site at which such hazardous waste or the products of treatment of such hazardous waste will be disposed of, treated, transported to, or stored.

(c) Permit issuance.—Upon a determination by the Administrator (or a State, if applicable), of compliance by a facility for which a permit is applied for under this section with the requirements of this section and section 6924 of this title, the Administrator (or the State) shall issue a permit for such facilities. In the event permit applicants propose modification of their facilities, or in the event the Administrator (or the State) determines that modifications are necessary to conform to the requirements under this section and section 6924 of this title, the permit shall specify the time allowed to complete the modifications.

(d) Permit revocation.—Upon a determination by the Administrator (or by a State, in the case of a State having an authorized hazardous waste program under section 6926 of this title) of noncompliance by a facility having a permit under this chapter with the requirements of this section or section 6924 of this title, the Administrator (or State, in the case of a State having an authorized hazardous waste program under section 6926 of this title) shall revoke such permit.

(e) Interim status.—Any person who—

(1) owns or operates a facility required to have a permit under this section which facility is in existence on November 19, 1980,

(2) has complied with the requirements of section 6930(a) of this title, and

(3) has made an application for a permit under this section

shall be treated as having been issued such permit until such time as final administrative disposition of such application is made, unless the Administrator or other plaintiff proves that final administrative disposition of such application has not been made because of the failure of the applicant to furnish information reasonably required or requested in order to process the application.

(f) Coal mining wastes and reclamation permits.—Notwithstanding subsection (a) through (e) of this section, any surface coal mining and reclamation permit covering any coal mining wastes or overburden which has been issued or approved under the Surface Mining Control and Reclamation Act of 1977 shall be deemed to be a permit issued pursuant to this section with respect to the treatment, storage, or disposal of such wastes or overburden. Regulations promulgated by the Administrator under this subchapter shall not be applicable to treatment, storage, or disposal of coal mining wastes and overburden which are covered by such a permit.

Pub.L. 89-272, Title II, § 3005, as added Pub.L. 94-580, §2, Oct. 21, 1976, 90 Stat. 2808.

As amended Pub.L. 95-609, § 7(h), Nov. 8, 1978, 92 Stat. 3082; Pub.L. 96-482, §§ 10, 11, Oct. 21, 1980, 94 Stat. 2338.

Section 3009 of the Resource Conservation and Recovery Act, 42 U.S.C.A. § 6929:

§ 6929. Retention of State authority

Upon the effective date of regulations under this subchapter no State or political subdivision may impose any requirements less stringent than those authorized under this subchapter respecting the same matter as governed by such regulations, except that if application of a regulation with respect to any matter under this subchapter is postponed or enjoined by the action of any court, no State or political subdivision shall be prohibited from acting with respect to the same aspect of such matter until such time as such regulation takes effect. Nothing in this chapter shall be construed to prohibit any State or political subdivision thereof from imposing any requirements, including those for site selection, which are more stringent than those imposed by such regulations.

Pub.L. 89-272, Title II, § 3009, as added Pub.L. 94-580, §2, Oct. 21, 1976, 90 Stat. 2812.

As amended Pub.L. 96-482, § 14, Oct. 21, 1980, 94 Stat. 2342.

Section 3010 of the Resource Conservation and Recovery Act, 42 U.S.C.A. § 6930:

§ 6930. Effective date

(a) Preliminary notification.—Not later than ninety days after promulgation of regulations under section 6921 of this title identifying by its characteristics or listing any substance as hazardous waste subject to this subchapter, any person generating or transporting such substance or owning or operating a facility for treatment, storage, or disposal of such substance shall file with the Administrator (or with States having authorized hazardous waste permit programs under section 6926 of this title) a notification stating the location and general description of such activity and the identified or listed hazardous wastes handled by such person. In revising any regulation under section 6921 of this title identifying additional characteristics of hazardous waste or listing any additional substance as hazardous waste subject to this subchapter, the Administrator may require any person referred to in the preceding sentence to

file with the Administrator (or with States having authorized hazardous waste permit programs under section 6926 of this title) the notification described in the preceding sentence. Not more than one such notification shall be required to be filed with respect to the same substance. No identified or listed hazardous waste subject to this subchapter may be transported, treated, stored, or disposed of unless notification has been given as required under this subsection.

(b) Effective date of regulation.—The regulations under this subchapter respecting requirements applicable to the generation, transportation, treatment, storage, or disposal of hazardous waste (including requirements respecting permits for such treatment, storage, or disposal) shall take effect on the date six months after the date of promulgation thereof (or six months after the date of revision in the case of any regulation which is revised after the date required for promulgation thereof).

Pub.L. 89-272, Title II, § 3010, as added Pub.L. 94-580, §2, Oct. 21, 1976, 90 Stat. 2812.

As amended Pub.L. 96-482, § 15, Oct. 21, 1980, 94 Stat. 2342.

APPENDIX 3

Section 21(d) of the Illinois Environmental Protection Act, *Ill. Rev. Stat.*, 1979, ch. 111½, § 1021(d):

1021. Acts prohibited

§ 21. No person shall:

. . . . . .

(d) Conduct any refuse-collection or refuse-disposal operations, except for refuse generated by the operator's own activities, without a permit granted by the Agency upon such conditions, including periodic reports and full access to adequate records and the inspection of facilities, as may be necessary to assure compliance with this Act and with regulations adopted thereunder, after the Board has adopted standards for the location, design, operation, and maintenance of such facilities. The above exception shall not apply to any hazardous waste, except that the exception shall apply to any person engaged in agricultural activity who is disposing of a substance which would normally be classified as hazardous if the substance was acquired for use by that person on his own property;

. . . . .

APPENDIX 4

§ 122.24 Contents of Part A.

(Applicable to State RCRA programs, see § 123.7.)

In addition to the information in § 122.4(d), Part A of the RCRA application shall include the following information:

(a) The latitude and longitude of the facility.

(b) The name, address, and telephone number of the owner of the facility.

(c) An indication of whether the facility is new or existing and whether it is a first or revised application.

(d) For existing facilities, a scale drawing of the facility showing the location of all past, present, and future treatment, storage, and disposal areas.

(e) For existing facilities, photographs of the facility clearly delineating all existing structures; existing treatment, storage, and disposal areas; and sites of future treatment, storage, and disposal areas.

(f) A description of the processes to be used for treating, storing, and disposing of hazardous waste, and the design capacity of these items.

(g) A specification of the hazardous wastes listed or designated under 40 CFR Part 261 to be treated, stored, or disposed at the facility, an estimate of the quantity of such wastes to be treated, stored, or disposed annually, and a general description of the processes to be used for such wastes.

§ 122.25 Contents of Part B.

[122.25 revised by 46 FR 2847, January 12, 1981]

[*Editor's note:* All paragraphs except 122.25(a)(1)-(10) were issued as interim final.]

(Applicable to State RCRA programs, see § 123.7)

Part B information requirements presented below reflect the standards promulgated in 40 CFR Part 264. These information requirements are necessary in order for EPA to determine compliance with the Part 264 standards. If owners and operators of HWM facilities can demonstrate that the information prescribed in Part B can *not* be provided to the extent required, the Director *may* make allowance for submission of such information on a case by case basis. Information required in Part B shall be submitted to the Director and signed in accordance with requirements in § 122.6. Certain technical data, such as design drawings and specifications, and engineering studies shall be certified by a registered professional engineer. Part B of the RCRA application includes the following:

(a) *General information requirements.* The following information is required for all HWM facilities, except as § 264.1 provides otherwise:

(1) A general description of the facility.

(2) Chemical and physical analyses of the hazardous wastes to be handled at the facility. At a minimum, these analyses shall contain all the information which must be known to treat, store, or dispose of the wastes properly in accordance with Part 264.

(3) A copy of the waste analysis plan required by § 264.13(b) and, if applicable, § 264.13(c).

(4) A description of the security procedures and equipment required by § 264.14, or a justification demonstrating the reasons for requesting a waiver of this requirement.

(5) A copy of the general inspection schedule required by § 264.15(b); *Note:* Include, where applicable, as part of inspection schedule, specific requirements in §§ 264.174, 264.194, 264.226, and 264.254.

(6) A justification of any request for a waiver(s) of the preparedness and prevention requirements of Part 264, Subpart C.

(7) A copy of the contingency plan required by Part 264, Subpart D. *Note:* Include, where applicable, as part of the contingency plan, specific requirements in §§ 264.227 and 264.255.

(8) A description of procedures, structures, or equipment used at the facility to:

(i) Prevent hazards in unloading operations (for example, ramps, special forklifts);

(ii) Prevent runoff from hazardous waste handling areas to other areas of the facility or environment, or to prevent flooding (for example, berms, dikes, trenches);

(iii) Prevent contamination of water supplies;

(iv) Mitigate effects of equipment failure and power outages; and

(v) Prevent undue exposure of personnel to hazardous waste (for example, protective clothing).

(9) A description of precautions to prevent accidental ignition or reaction of ignitable, reactive, or incompatible wastes as required to demonstrate compliance with § 264.17 including documentation demonstrating compliance with § 264.17(c).

(10) Traffic pattern, estimated volume (number, types of vehicles) and control (for example, show turns across traffic lanes, and stacking lanes (if appropriate); describe access road surfacing and load bearing capacity; show traffic control signals).

(11) Facility location information:

(i) In order to determine the applicability of the seismic standard [§ 264.18(a)] the owner or operator of a new facility must identify the political jurisdiction (e.g., county, township, or election district) in which the facility is proposed to be located.

[*Comment:* If the county or election district is *not* listed in Appendix VI of Part 264, no further information is required to demonstrate compliance with § 264.18(a).]

(ii) If the facility is proposed to be located in an area listed in Appendix VI of Part 264, the owner or operator shall demonstrate compliance with the seismic standard. This demonstration may be made using either published geologic data or data obtained from field investigations carried out by the applicant. The information provided must be of such quality to be acceptable to geologists experienced in identifying and evaluating seismic activity. The information submitted must show that either:

(A) No faults which have had displacement in Holocene time are present, or no lineations which suggest the presence of a fault (which have displacement in Holocene time) within 3,000 feet of a facility are present, based on data from:

(*1*) published geologic studies,

(2) aerial reconnaissance of the area within a five-mile radius from the facility,

(3) an analysis of aerial photographs covering a 3,000 foot radius of the facility, and

(*4*) if needed to clarify the above data, a reconnaissance based on walking portions of the area within 3,000 feet of the facility, or

(B) If faults (to include lineations) which have had displacement in Holocene time are present within 3,000 feet of a facility, no faults pass within 200 feet of the portions of the facility where treatment, storage, or disposal of hazardous waste will be conducted, based on data from a comprehensive geologic analysis of the site. Unless a site analysis is otherwise conclusive concerning the absence of faults within 200 feet of such portions of the facility, data shall be obtained from a subsurface exploration (trenching) of the area within a distance

no less than 200 feet from portions of the facility where treatment, storage, or disposal of hazardous waste will be conducted. Such trenching shall be performed in a direction that is perpendicular to known faults (which have had displacement in Holocene time) passing within 3,000 feet of the portions of the facility where treatment, storage, or disposal of hazardous waste will be conducted. Such investigation shall document with supporting maps and other analyses, the location of any faults found.

[*Comment:* The Guidance Manual for the Location Standards provides greater detail on the content of each type of seismic investigation and the appropriate conditions under which each approach or a combination of approaches would be used.]

(iii) Owners and operators of all facilities shall provide an identification of whether the facility is located within a 100-year floodplain. This identification must indicate the source of data for such determination and include a copy of the relevant Federal Insurance Administration (FIA) flood map, if used, or the calculations and maps used where a FIA map is not available. Information shall also be provided identifying the 100-year flood level and any other special flooding factors (e.g., wave action) which must be considered in designing, constructing, operating, or maintaining the facility to withstand washout from a 100-year flood.

[*Comment:* Where maps for the National Flood Insurance Program produced by the Federal Insurance Administration (FIA) of the Federal Emergency Management Agency are available, they will normally be determinative of whether a facility is located within or outside of the 100-year floodplain. However, where the FIA map excludes an area (usually areas of the floodplain less than 200 feet in width), these areas must be considered and a determination made as to whether they are in the 100-year floodplain. Where FIA maps are not available for a proposed facility location, the owner or operator must use

equivalent mapping techniques to determine whether the facility is within the 100-year floodplain, and if so located, what the 100-year flood elevation would be.]

(iv) Owners and operators of facilities located in the 100-year floodplain must provide the following information:

(A) Engineering analysis to indicate the various hydrodynamic and hydrostatic forces expected to result at the site as a consequence of a 100-year flood.

(B) Structural or other engineering studies showing the design of operational units (e.g., tanks, incinerators) and flood protection devices (e.g., floodwalls, dikes) at the facility and how these will prevent washout.

(C) If applicable, and in lieu of paragraphs (A) and (B) above, a detailed description of procedures to be followed to remove hazardous waste to safety before the facility is flooded, including:

(*1*) timing of such movement relative to flood levels, including estimated time to move the waste, to show that such movement can be completed before floodwaters reach the facility.

(2) a description of the location(s) to which the waste will be moved and demonstration that those facilities will be eligible to receive hazardous waste in accordance with the regulations under Parts 122 through 124 and 264 through 266 of this Chapter.

(*3*) the planned procedures, equipment, and personnel to be used and the means to ensure that such resources will be available in time for use.

(*4*) the potential for accidental discharges of the waste during movement.

(v) *Existing facilities NOT* in compliance with § 264.18(b) shall provide a plan showing how the facility will be brought into compliance and a schedule for compliance.

(12) An outline of both the introductory and continuing training programs by owners or operators to prepare persons to operate or maintain the HWM facility in a safe manner as required to demonstrate compliance with § 264.16. A brief description of how training will be designed to meet actual job tasks in accordance with requirements in § 264.16(a)(3).

(13) A copy of the closure plan and, where applicable, the post-closure plan required by §§ 264.112 and 264.118.

Note.—Include, where applicable, as part of the plans, specific requirements in §§ 264.178, 264.197, 264.228 and 264.258.

(14) For existing facilities, documentation that a notice has been placed in the deed or appropriate alternate instrument as required by § 264.120.

(15) The most recent closure cost estimate for the facility prepared in accordance with § 264.142 plus a copy of the financial assurance mechanism adopted in compliance with § 264.143.

(16) Where applicable, the most recent post-closure cost estimate for the facility prepared in accordance with § 264.144 plus a copy of the financial assurance mechanism adopted in compliance with § 264.145.

(17) Where applicable, a copy of the insurance policy or other documentation which comprises compliance with the requirements of § 264.147. For a new facility, documentation showing the amount of insurance meeting the specification of § 264.147(a) and, if applicable, § 264.147(b), that the owner or operator plans to have in effect before initial receipt of hazardous waste for treatment, storage, or disposal. A request for a variance in the amount of required coverage, for a new or existing facility, may be submitted as specified in § 264.147(d).

(18) Where appropriate, proof of coverage by a State financial mechanism in compliance with §§ 264.149 or 264.150.

(19) A topographic map showing a distance of 1000 feet around the facility as a scale of 2.5 centimeters (1 inch) equal to not more than 61.0 meters (200 feet). Contours must be shown on the map. The contour interval must be sufficient to clearly show the pattern of surface water flow in the vicinity of and from each operational unit of the facility. For example, contours with an interval of 1.5 meters (5 feet), if relief is greater than 6.1 meters (20 feet), or an interval of 0.6 meters (2 feet), if relief is less than 6.1 meters (20 feet). Owners and operators of HWM facilities located in mountainous areas should use larger contour intervals to adequately show topographic profiles of facilities. The map shall clearly show the following:

(i) Map scale and date.

(ii) 100-year floodplain area.

(iii) Surface waters including intermittent streams.

(iv) Surrounding land uses (residential, commercial, agricultural, recreational).

(v) A wind rose (i.e., prevailing windspeed and direction).

(vi) Orientation of the map (north arrow).

(vii) Legal boundaries of the HWM facility site.

(viii) Access control (fences, gates).

(ix) Injection and withdrawal wells both on-site and off-site.

(x) Buildings; treatment, storage, or disposal operations; or other structures (recreation areas, runoff control systems, access and internal roads, storm, sanitary, and process sewerage systems, loading and unloading areas, fire control facilities, etc.)

(xi) Barriers for drainage or flood control.

(xii) Location of operational units within the HWM facility site, where hazardous waste is (or will be) treated, stored, or disposed (include equipment cleanup areas).

Note.—For large HWM facilities, the Agency will allow the use of other scales on a case by case basis.

(20) Applicants may be required to submit such information as may be necessary to enable the Regional Administrator to carry out his duties under other Federal laws as required in § 122.12 of this Part.

(b) *Specific information requirements.* The following additional information is required from owners or operators of specific types of HWM facilities that are used or to be used for storage or treatment:

(1) For facilities that store *containers* of hazardous waste, except as otherwise provided in § 264.170.

(i) A description of the containment system to demonstrate compliance with § 264.175. Show at least the following:

(A) Basic design parameters, dimensions, and materials of construction.

(B) How the design promotes drainage or how containers are kept from contact with standing liquids in the containment system.

(C) Capacity of the containment system relative to the number and volume of containers to be stored.

(D) Provisions for preventing or managing run-on.

(E) How accumulated liquids can be analyzed and removed to prevent overflow.

(ii) Sketches, drawings, or data demonstrating compliance with § 264.176 (location or buffer zone and containers holding ignitable or reactive wastes) and § 264.177(c) (location of incompatible wastes), where applicable.

(iii) Where incompatible wastes are stored or otherwise managed in containers, a description of the procedures used to ensure compliance with §§ 264.177(a) and (b), and 264.17(b) and (c).

(2) For facilities that use *tanks* to store or treat hazardous waste, except as otherwise provided in § 264.190, description of design and operation procedures which demonstrate compliance with the requirements of §§ 264.191, 264.192, 264.198 and 264.199 including:

(i) References to design standards or other available information used (or to be used) in design and construction of the tank.

(ii) A description of design specifications including identification of construction materials and lining materials (include pertinent characteristics such as corrosion or erosion resistance).

(iii) Tank dimensions, capacity, and shell thickness.

(iv) A diagram of piping, instrumentation, and process flow.

(v) Description of feed systems, safety cutoff, bypass systems, and pressure controls (e.g., vents).

(vi) Description of procedures for handling incompatible ignitable, or reactive wastes, including the use of buffer zones.

(3) For facilities that store or treat hazardous waste in *surface impoundments*, except as otherwise provided in § 264.220, the owner or operator must submit detailed plans and specifications accompanied by an engineering report which must collectively include the information itemized in paragraphs (i) through (x). For new facilities, the plans and specifications must be in sufficient detail to provide complete information to a contractor hired to build the facility even if the owner or operator intends to construct the facility without hiring a contractor. For existing facilities, comparable detail must be provided, but the form of presentation need not assume contractor construction except to the extent that the facility will be modified.

(i) A statement of the minimum freeboard to be maintained at the facility and the basis of the design to demonstrate compliance with freeboard requirements of §§ 264.221(a) and 264.222(a) and (b). For flow through facilities include a hydraulic profile.

(ii) Detailed drawings of the structure which is or will be provided to immediately stop flow into the impoundment to comply with § 264.221(b); or, if no structure is needed to comply with § 264.227(c)(1), a description of the means by which waste additions will be stopped.

(iii) Detailed drawings of any dikes which exist or will be constructed.

(iv) A basis of design and design analysis of any dikes to comply with §§ 264.221(d) and 264.223(a). The design analysis must show that any dike will meet the requirements of § 264.226(c)(1).

(v) Detailed design drawings and specifications of the liner(s) and the leachate detection, collection, and removal system and the basis of design and design analysis to comply with §§ 264.221(c), 264.221(e), and 264.223(b), (c), and (d).

(vi) Liner installation instructions to comply with the requirements of § 264.226(a). For existing facilities, when the owner or operator proposes to rely on existing liners, a description of the installation procedures used.

(vii) Design details of the leachate removal system, the basis of design, and a description of the operating procedures to be used to ensure free flow from the collection system in accordance with § 264.222(c).

(viii) Design plans and specifications and basis of design of any structures needed to comply with § 264.222(e).

(ix) A description of the maintenance and repair procedures proposed to comply with §§ 264.222(d) and 264.15(c).

(x) A description of the operating procedures that will ensure compliance with §§ 264.229 and 264.230.

(xi) A certification by a qualified engineer which complies with § 264.226(c). The owner or operator of a new facility must submit a statement by a qualified engineer that he will provide such a certification upon completion of construction in accordance with the plans and specifications.

(4) For facilities that store or treat hazardous waste in *waste piles*, except at otherwise provided in § 264.250.

(i) A description of practices to control wind dispersal (e.g., cover or frequent wetting) of hazardous waste in piles so that the Director, where necessary, can specify appropriate control measures.

(ii) A detailed engineering description of the facility design including:

(A) A description of measures to divert run-on away from the pile;

(B) A description of the leachate and run-off collection and control system;

(C) A description of the foundation supporting the base;

(D) Design specifications of the pile base and liner (or liners) including the estimated containment life of the base and the permeability of the liner(s);

(E) Estimated life of the hazardous waste pile; and

(F) If applicable under § 264.253(a)(3), a description of the leachate detection, collection, and removal system including the system's relation to the water table and a description of any efforts to control the water table.

(iii) A detailed description of the facility operating procedures which demonstrate compliance with §§ 264.252, 264.253, 264.256 (ignitable or reactive waste), and 264.257 (incompatible waste) including:

(A) A description of efforts to protect the containment system from plant growth which could puncture any component of the system;

(B) A description of design and operating procedures to properly manage and dispose of any leachate that is a hazardous waste;

(C) A description and listing of all equipment and procedures used to place the waste in or on the pile or to clean and expose the liner surface; and

(D) A description of efforts to separate hazardous waste that is incompatible with any waste or material stored nearby including the design specifications of any dike, berm, wall, or other device used to separate the materials.

[122.25(b)(5) added by 46 FR 7678, January 23, 1981]

[Interim Final]

(5) For facilities that *incinerate hazardous* waste, except as § 264.340 of this Chapter provides otherwise, the applicant must fulfill the requirements of paragraph (b)(5)(i), (ii), or (iii) of this Section.

(i) When seeking exemption under § 264.340(b) (Ignitable waste only):

(A) That the waste is either (1) listed as a hazardous waste in Part 261, Subpart D of this Chapter, only because it is ignitable (Hazard Code I) or, (2) that the waste has been tested against the characteristics of hazardous waste under Part 261, Subpart C of this Chapter, and that it meets only the ignitability characteristic, and includes none of the hazardous constituents listed in Part 261, Appendix VIII of this Chapter; or

(ii) Submit results of a trial burn conducted in accordance with § 122.27(b) including all the determinations required by § 122.27(b); or

(iii) In lieu of a trial burn, the applicant may submit the following information:

(A) An analysis of each waste or mixture of wastes to be burned including:

(*1*) Heat value of the waste in the form and composition in which it will be burned.

(2) Viscosity (if applicable), or description of physical form of the waste.

[122.25(b)(5)(iii)(A)(3) and (4) amended by 46 FR 35247, July 7, 1981]

(*3*) An identification of any hazardous organic constituents listed in Part 261, Appendix VIII of this Chapter, which are present in the waste to be burned, except that the applicant need not analyze for constituents listed in Part 261, Appendix VIII, of this Chapter which would reasonably not be expected to be found in the waste. The constituents excluded from analysis must be identified and the basis for their exclusion stated. The waste analysis must rely on analytical techniques specified in "Test Methods for the Evaluation of Solid Waste, Physical/Chemical Methods" (incorporated by reference, see § 122.20 and referenced in 40 CFR Part 261, Appendix III), or their equivalent.

(*4*) An approximate quantification of the hazardous constituents identified in the waste, within the precision produced by the analytical methods specified in "Test Methods for the Evaluation of Solid Waste, Physical/Chemical Methods" (incorporated by reference, see § 122.20).

(5) A quantification of those hazardous constituents in the waste which may be designated as POHC's based on data submitted from other trial or operational burns which demonstrate compliance with the performance standard in § 264.343 of this Chapter.

(B) A detailed engineering description of the incinerator, including:

(*1*) Manufacturer's name and model number of incinerator.

(*2*) Type of incinerator.

(*3*) Linear dimension of incinerator unit including cross sectional area of combustion chamber.

(*4*) Description of auxiliary fuel system (type/feed).

(*5*) Capacity of prime mover.

(*6*) Description of automatic waste feed cutoff system(s).

(*7*) Stack gas monitoring and pollution control monitoring system.

(*8*) Nozzle and burner design.

(*9*) Construction materials.

(*10*) Location and description of temperature, pressure, and flow indicating devices and control devices.

(C) A description and analysis of the waste to be burned compared with the waste for which data from operational or trial burns are provided to support the contention that a trial burn is not needed. The data should include those items listed in § 122.25(b)(5)(iii)(A). This analysis should specify the POCH's which the applicant has identified in the waste for which a permit is sought, and any differences from the POCH's in the waste for which burn data are provided.

(D) The design and operating conditions of the incinerator unit to be used, compared with that for which comparative burn data are available.

(E) A description of the results submitted from any previously conducted trial burn(s) including:

(*1*) Sampling and analysis techniques used to calculate performance standards in § 264.343 of this Chapter,

(2) Methods and results of monitoring temperatures, waste feed rates, air feed rates, and carbon monoxide,

(3) Idendification of any hazardous combustion by-products detected,

(4) The certification and results required by §122.27 (b)(5)(ii).

(F) The expected incinerator operation information to demonstrate compliance with §§ 264.343 and 264.345 of this chapter including:

(1) Expected carbon monoxide (CO) level in the stack exhaust gas.

(2) Waste feed rate.

(3) Combustion zone temperature.

(4) Air feed rate.

(5) Expected stack gas volume, flow rate, and temperature.

(6) Computed residence time for waste in the combustion zone.

(7) Expected hydrochloric acid removal efficiency.

(8) Expected fugitive emissions and their control procedures.

(9) Proposed waste feed cut-off limits based on the identified significant operating parameters.

(G) Such supplemental information as the Director finds necessary to achieve the purposes of this paragraph.

(H) Waste analysis data, including that submitted in paragraph (b)(5)(iii)(A), sufficient to allow the Director to specify as permit Principal Organic Hazardous Constituents (permit POHC's) those constituents for which destruction and removal efficiencies will be required.

(iv) The Director shall approve a permit application without a trial burn if he finds that:

(A) The wastes are sufficiently similar; and

(B) The incinerator units are sufficiently similar, and the data from other trial burns are adequate to specify (under § 264.345 of this Chapter) operating conditions that will ensure that the performance standards in § 264.343 of this Chapter will be met by the incinerator.

(c) [Reserved]

Note.—Requirements set forth in § 122.25(a) and (b) reflect the Part 264 regulations promulgated on May 19, 1980 and today. Additional permit application requirements including those for other treatment and disposal facilities will be promulgated when the remaining portions of Part 264 are promulgated.

Petitioner's Reply Brief

No. 81-900

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IN THE

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OCTOBER TERM 1981

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Petitioner,

v.

TYRONE C. FAHNER, individually and as Attorney General of the State of Illinois,
Respondent,

and

PEOPLE OF THE STATE OF ILLINOIS, ex rel. TYRONE C. FAHNER, Attorney General,
Respondent,

v.

NUCLEAR ENGINEERING COMPANY, INC.,
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PETITIONER'S RESPONSE TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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May it please the Court.—

In brief response to the numbered points under Argument On The Law, petitioner states:

1. Respondent's argument (p.10) serves to emphasize the general importance of resolving the conflicting and confusing approaches to the *Wycoff* dictum by various of the United States Courts of Appeal.

The significance of this issue (see Mr. Justice White, dissenting from denial of certiorari in *United Air Lines* v. *Division of Industrial Safety*, 50 L W 3298) cannot be disregarded here by pretending that the application of the *Wycoff* dictum "formed no part of [the Seventh Circuit's] holding that the NECO suit ought to be dismissed" (p. 10). The *Wycoff* dictum was, in fact, the linchpin of the decision below, because—as the Seventh Circuit itself recognized—the idea that there was no case or controversy was completely belied by the fact that the Illinois Attorney General did file suit exactly as promised. (Appendix 1 to Petition, pp. 21a-23a.) Was there then no case or controversy?

Neither the Seventh Circuit nor respondents can face up to the cases decided by this Court which have totally disregarded the *Wycoff* dictum, and neither the Opinion below nor the Brief in Opposition even mentions the numerous such cases cited on pages 12-13 of the Petition. All of these cases so cited are necessarily inconsistent with the novel position—*Younger* v. *Harris*— to which respondents retreat. *Younger* v. *Harris*, 401 U. S. 37 (1971), is not even mentioned in the Opinion below, and it is not applicable here, where the federal court suit is filed first and does not involve any uncertainty in the meaning of state statutory law or interference in the application of a complicated regulatory program. Petitioner's operations are fully approved by the Illinois EPA. It is respondent who is attempting to interfere with that administrative regulation by claiming that petitioner's fully approved operation is nevertheless a common law nuisance. *Zablocki* v. *Redhail*, 434 U. S. 374, 379 f. 5 (1978); *Wooley* v. *Maynard*, 430 U. S. 705, 710 (1977); *Steffel* v. *Thompson*, 415 U. S. 452, 462 (1974); *Lake Carriers' Assn.* v. *Mac Mullan*, 406 U. S. 498, 509 (1972); *Zwickler* v. *Koota*, 389 U. S. 241, 248 (1967); *Babbit* v. *Farm Workers*, 442 U. S. 289, 306 (1979).

2. The respondent's argument points up the importance of this Court resolving the conflict over the *Seney* doctrine.

3. The argument here is completely inconsistent with all the cases in which this Court, disregarding the *Wycoff* dictum, has upheld federal court jurisdiction over declaratory judgment and injunction actions against threatened state enforcement proceedings. Also the argument (p. 16) that there is no case or controversy because the nature of the relief respondent said he intended to seek in his promised (and filed) lawsuit "(an order closing the site and directing removal of all wastes buried there) *made compliance impossible*", is patently unsound. And it is simply not true that "there are no allegations by NECO that the Federal constitution or federal law preempts Illinois efforts to regulate its activities" (p. 15). The heart of petitioner's complaint is that the type of "regulation", namely, annihilation, which respondent seeks violates petitioner's rights under the U. S. Constitution and under federal statute (RCRA).

4. Here, again, respondent seeks to retreat from a significant federal question of national importance decided below by asking this Court simply to disregard parts of the Opinion of the Seventh Circuit.

CONCLUSION

For the reasons presented in the Petition For Writ Of Certiorari said writ should issue to the United States Court of Appeals for the Seventh Circuit to review its decision herein.

Respectfully submitted,

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